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THE PANAMA QUESTION
IN THE LIGHT OF INTERNATIONAL LAW

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled THE PANAMA QUESTION IN THE LIGHT OF INTERNATIONAL LAW submitted by Morris F. Maduro, Jr. in partial fulfilment of the requirements for the degree of Master of Arts.

ABSTRACT

The nature of the relationship existing today between the United States and the Republic of Panama centers on a dispute between those states concerning the presence of the United States within Panamanian territory. The roots of the controversy stem from as far back as 1846, when the United States concluded a treaty with Colombia granting the former transit rights across the Isthmus of Panama--then a province of Colombia. With the independence of Panama in 1903 and by way of the grants made by that country to the United States for the construction of the Panama Canal, the relations between these two states became permanently and intimately entwined.

To this day, however, a controversy has raged in Panama concerning the legality of the events leading to the independence and the part played by the United States in those events. The first part of this study, therefore, examines those events up to 1903, and evaluates them in the light of international law.

In 1903, a treaty was signed between those countries which granted the United States the right to construct a canal across the Isthmus, and the possession--in perpetuity--of a strip of land on that territory in order to operate that waterway. Today, Panama is seeking a release from this treaty which, according to that nation, has resulted in sixty years

of injustice to its people. The second part of this study examines the Treaty of 1903 and the claims made by Panama against its validity. In addition, the juridical position of the Canal Zone and the Panama Canal will be examined in the light of international law, in order to determine their position in the international community.

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PART I

INTRODUCTION

In August of 1914, the Panama Canal, connecting the Atlantic and Pacific Oceans, was officially opened to the world's commerce, completing successfully the grand design, the roots of which can be traced back to the explorations of Christopher Columbus. In order to construct that waterway, the United States acquired from the Republic of Panama the use--in perpetuity--of a strip of land, fifty miles long by ten miles wide, extending across the center of the Isthmus from the Atlantic to the Pacific waters.

More than half a century later, the Republic of Panama is still embroiled in the midst of a controversy concerning the circumstances under which that land had been placed under United States control. The country that was created in order to guarantee the construction of that canal and that shouted "viva los Americanos!" in 1903 as it welcomed the gigantic enterprise, today shouts "el canal es nuestro!," and "soberanía o muerte!." No single issue has so dominated that nation's politics as has the persistent "canal question."

Throughout the years a number of works have appeared dealing with the events of 1903. The emphasis, however, has in most cases been placed on the re-telling of those events, ignoring the earlier occurrences in Colombia and the developments that led to the independence, as well as failing to provide any critical analysis of the impact of those events on

the present day situation. In Panama, a plethora of cliché-ridden works deploring the Treaty of 1903 and dealing obsessively with the question of sovereignty have provided little insight into the matter. Since the excellent study by Harmodio Arias published in 1911, The Panama Canal, no substantive work has appeared dealing with the canal question from the point of view of international law. Two reasons may be noted for this. The issue has been so distorted by its use as a political instrument and so misconstrued by the media in Panama, making of it a convenient target for inflammatory attacks, that it has become difficult to place the matter in its true perspective.

The well-meaning writer has also preferred to stay away from any legal analysis because of the obvious difficulty in discerning the proper spheres of law and politics. It has been, of course, a problem for the student of international law to evaluate properly a matter resulting from political expediencies and placed against a backdrop of international law. Yet, the domains of international politics and the law of nations are so entwined as to make any isolated study meaningless.

It is not possible to understand the position of the Panama Canal before international law, without taking into account those factors responsible for its creation. I have sought, therefore, in the following study, to analyze the nature of the Panama Question in the light of international law, placing the critical emphasis on the legal aspects involved, but attempting at the same time to provide a discussion of the

historical developments and the political considerations in order to place the legal analysis within a more meaningful framework.

The first part of this study will center on the historical background, the various treaty arrangements, and the factors leading to the American interest and involvement in the construction of an interoceanic canal; a discussion of American intervention in the internal affairs of Colombia and the participation of the former in the acquisition of Panama's independence; and a legal analysis of the American involvement vis á vis the Treaty of 1846 with Colombia, the nature of the American Government's dealings with Colombia, and the question of the recognition of Panama.

The second part will attempt to deal with a legal study of the factors constituting the present dispute between the United States and Panama. It will include an examination of the Hay-Bunau-Varilla Treaty, its essential validity, meaning and content; an evaluation of Panama's claims against the treaty; and an effort to make clear the legal status of the Panama Canal and the Panama Canal Zone.

My purpose in adopting such an approach to the Panama Question, is to arrive at some insight into that issue by examining the political and legal controversies that have placed the two nations at odds for over sixty years, and evaluating these from the point of view of international law. In so doing it may be possible to attain a more objective and meaningful understanding of the relationship which now exists between the United States and the Republic of Panama.

CHAPTER I

THE BACKGROUND AND THE AMERICAN INVOLVEMENT

The idea of constructing an interoceanic canal across Central America in order to connect the Atlantic and Pacific Oceans, dates as far back as the fifteenth century, when it is believed that Christopher Columbus searched the area in the hope of finding a natural strait.[1] Few years were to elapse, however, before an overland route was completed by the Spanish explorers across the Isthmus of Panama in 1519 and the Chagres River made navigable in 1533, reducing the overland route (previously sixty miles) to some twenty miles.[2] From that date, the history of the area abounds with royal decrees, studies, and aborted efforts emanating from monarchs in Spain, Holland, the British Empire, France and Portugal. The Isthmus of Panama was not the only feasible location under consideration; sites were also proposed across Nicaragua, Costa Rica, the Isthmus of Tehuantepec in Mexico, and as far north as the Rio Grande.[3]

The interest in such a waterway and the preference for the Panama route are evident from a glance at a globe. By virtue of its position, Panama appears to be in the geographical center of the American Hemisphere. Resting snugly in the narrowest portion of what is often described as "Middle

America,"[4] Panama lies between the eighth and ninth parallels north of the Equator, its narrowest portion spanning only fifty miles between the two oceans.

Trade was the original and most important factor in stimulating a desire for an interoceanic waterway. By cutting across the Isthmus, a European trader bound for the East could almost halve the time and distance as well as avoid the perils of navigating around the Horn and sailing the treacherous southern seas.

The various studies carried out, however, revealed the true nature of that section of the Hemisphere, and serious consideration of the project was all but abandoned until the nineteenth century. The impenetrable jungle, marshy swamps, interminable rains, the hot dank air and maddening insects, were proving too much of a deterrent--even for such a grand project.

The turn of the century, though, was to mark the beginning of a new era in Latin America, as the Spanish colonies and vice-royalties stretching from the Rio Grande to the southernmost tip of South America were now resenting their harsh exploitation by Spain and assuming an identity of their own. The year 1810 marked the formal outbreak of revolution in Spanish America. France's chief colony, Haiti, was already free, and Portuguese Brazil would wait until 1822. By 1824 the struggle was over and Spanish America was no more.[5]

The Isthmus of Panama at this time was a mere province of the large territory known as Gran Colombia (later called

"Nueva Granada"--1832, and "Colombia"--1862). The country had achieved its independence from Spain in 1819, the Isthmus following suit in 1821.[6] The latter, even in colonial days, had always enjoyed a relative degree of autonomy. The principal city, Panama, was located some three hundred miles from the nearest Colombian town and cut off from the main body of the country by the Darien Jungle. The journey to Bogota, the Colombian capital, still took two to three weeks and consequently, the ties between Panama and Colombia were slack indeed. The Isthmus was all but neglected by the Colombian government and in the tradition of frequent revolution which Spain had left in Latin America, it had often tried to declare itself independent but always rejoined Colombia when its temper cooled.[7]

This fact, often ignored by Panamanian historians, was to be a crucial one in the events that were to come. Throughout its history with Colombia, Panama, with an area roughly the size of the State of Maine and with a population of less than 200,000, had "run its own disorderly house with little effective control from Bogota."[8] In fact a short-lived revolution in 1840 declared the union with Colombia at an end and for less than a year, an independent government ruled the "Free State of the Isthmus."[9]

The interest in a canal was revived shortly after the independence from Spain. Simon Bolivar, the South American Liberator, called all the governments of the continent in 1826 to the famous Congress of Panama, in order to discuss plans for a confederation. An invitation was also sent to the

United States of America, and in his instructions to the American delegates to that Congress, Secretary of State Henry Clay wrote:

> A canal for navigation between the Atlantic and Pacific Oceans will form a proper subject for consideration at the Congress. That vast object, if it should ever be accomplished, will be interesting in a greater or less degree to all parts of the world, but especially to this continent will accrue its greatest benefits.[10]

Though this was the first announcement by the United States in reference to a canal, little serious interest was displayed by that country in a canal project for the next two decades. The policy of the State Department during this time was of the laissez-faire type, either because there did not appear to exist a pressing demand for such an enterprise, or because the relative strength of the nation did not encourage politicians to a broader foreign policy which could encumber the administration.[11] It was not long, however, before this attitude was to change markedly. The Mexican War in 1846 resulted in the acquisition by the United States of vast territories extending to the Pacific shores and the absence of direct communication with that area gave a new impetus to canal projects.[12]

On December 12 of that year, the United States took its first step in this direction by concluding a treaty with Colombia (known at that time as "Nueva Granada"). The Treaty of Nueva Granada, signed by the American chargé d'affaires at Bogota, Benjamin Bidlack, and the Colombian Minister of Foreign Affairs, Manuel Mallarino, was little more than a transit privilege for the citizens and merchandise of the United States

across the Isthmus of Panama. It had become a practice for vessels to dock on one side of the Isthmus to unload passengers and merchandise which would then be carried across the Isthmus to reload onto waiting ships on the other side. The traffic was increasing steadily and the need for such a convention with Colombia was obvious. Article XXXV of the Treaty, however, contained mutual guarantees that were later to place the United States in a legally vulnerable position, since the treaty was operative at the time of Panama's independence in 1903. According to that article

> The Government of Nueva Granada guarantees to the Government of the United States that the right of passage or transit across the Isthmus of Panama, by any means of communication that now exist, or that may be hereafter constructed, shall be free and open to the government and citizens of the United States; . . . and the United States guarantees positively and efficaciously to Nueva Granada . . . the perfect neutrality of the before-mentioned Isthmus, with the view that at no time during the existence of this treaty shall the free transit from one sea to the other be interrupted or prevented; and in consequence, [the United States] also guarantees in the same manner, the rights of sovereignty and property which Nueva Granada has and possesses over the said territory.[13]

President Polk, in his message to the Senate explaining the Treaty, pointed out that the Treaty was "not an alliance for a political object, but for a purely commercial interest."[14] No mention was made in the Treaty of any exclusive control of the transit route by the United States or of any impending canal enterprise, thereby providing no foundation for the later claim that the prime purpose of the Treaty was for the future construction by the United States of an interoceanic canal across that route. Neither was there any indication in the Treaty that the Isthmus of Panama would be bound by its obliga-

tions, in the event of secession from Colombia. The Treaty was concluded by the Colombian Government, as the sovereign of the Province of Panama.[15]

Meanwhile, the British, clearly foreseeing the result of the Mexican War and hastening to secure their interests in Central America against any further American imperialism, pressed their claim against Nicaragua over the disputed Mosquito Territory in 1848, thereby controlling the termini of one of the most promising canal sites. The Gold Rush was now mushrooming, and in a storm of indignation, a special envoy was sent from the United States State Department to Nicaragua to protect American interests. The envoy, Elijah Hise, quickly signed an unauthorized treaty with that country. Fearing conflict with Britain, President Taylor recalled Hise and disavowed the treaty. No sooner was a new envoy appointed than he too signed another treaty with Nicaragua and one with Honduras, ceding the disputed Tigre Island to the United States. The British Consul in Guatemala then seized the island--also without authorization. As a result, both envoys were subsequently rebuked by their respective governments, and both Great Britain and the United States, realizing the precarious stalemate over the issue and not disposed to going to war over the canal route, concluded the Clayton-Bulwer Treaty in 1850.[16] By its terms, neither country would ever seek to obtain any exclusive control over any Nicaraguan canal; neither was to take possession of, fortify, colonize or exercise dominion over any part of Central America; both were to guard the safety and neutrality

of any proposed canal; and both agreed to support any satisfactory company that would undertake the work. These points were to be applicable as a "general principle" for any projects in Tehuantepec (Mexico) and Panama as well.[17]

This agreement is of little significance to our study, since it was superseded by a second treaty in 1901; however, by averting a major crisis with Great Britain, the United States now found itself stipulating never to obtain any exclusive control over any canal. This instrument was to remain a formidable obstruction to the United States for half a century until its abrogation in 1901. The Treaty of 1846, also checking any American plans for the Isthmian area, continued to define relations between Colombia and the United States, despite several futile attempts at revision.[18]

Meanwhile, construction of the Panama Railroad across the Isthmus was started in 1850 in response to the increasing overland traffic. Chartered by the New York State Legislature and built by private American capital, this first transcontinental railway was opened for traffic in 1855.[19]

The French, inspired by success at building the Suez Canal, now turned to the West and plunged into a zealous attempt to construct another one through Panama. Ferdinand de Lesseps, apparently blinded by the Suez venture, formed a French company financed by private investors, purchased a previous concession from Colombia obtained by an earlier engineer, and bought the Panama Railroad for upwards of $20,000,000, four times what it had cost to construct.[20] Work began swiftly in

1883, while the United States sought means to enhance its moral supremacy. In a message to the Senate in 1880, as the French prepared to break ground, President Hayes stated:

> The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power or to any combination of European powers.[21]

The statement that followed was to set the tenor of future American policy with regard to a canal:

> An interoceanic canal across the American Isthmus . . . would be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coastline of the United States.[22]

Within six years, after having completed two-fifths of the digging, the French company suspended all operations in May of 1889. After some 20,000 deaths, de Lesseps' scheme succumbed to mismanagement, graft, disease and swamps, thus ending what later became known as the French Tragedy.[23]

While the French project was just beginning, the United States was searching for a means of release from the trammels of the Clayton-Bulwer Treaty. Secretary of State Blaine, during James Garfield's administration, assumed the attitude with Great Britain, that the Treaty actually did not apply to a canal at Panama; but the British stood firm.[24]

The Spanish-American War in 1898 provided another crucial turning point. The cruise of the Oregon around South America in order to arrive at the theatre of war from San Francisco focused American opinion more sharply. The annexation of Hawaii in that year, and the entanglements in the Philippines, Guam, Haiti, Cuba and Santo Domingo[25] brought even more

importance to the question of maritime communications. By the end of the year, chambers of commerce, politicians, and the press of the United States, regardless of their views on other aspects of overseas expansion, were demanding that the government take steps to amend or abrogate the Clayton-Bulwer Treaty and subsidize the construction of the Isthmian waterway.[26]

Lord Pauncefote, the British Ambassador at Washington, was summoned to discuss the matter in 1899, and by 1901, Great Britain, in what Arias termed a "conciliatory disposition"[27] had signed the Hay-Pauncefote Treaty. Superseding the 1850 agreement, it surrendered Britain's grasp on any canal project and allowed the United States free play as of its subsequent ratification. Article II of that treaty states:

> It is agreed that the canal may be constructed under the auspices of the Government of the United States . . . [and] the said government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.[28]

Though he played no part in the negotiations, the Treaty was countersigned by the newly-inaugurated President--Theodore Roosevelt.

At the turn of the century, then, with involvements throughout the Caribbean and with the concept of manifest destiny extending well beyond the continental boundaries, the question of an Isthmian canal was no longer one of convenience, but one of necessity to the United States--for strategic, political and economic reasons.

In all fairness, it was natural that the United States, which was now militarily and economically the leading power in

the Western Hemisphere, should entertain thoughts of becoming the "master of its own house." The ideas of manifest destiny, "expansion fever," and the "white man's burden" were well on their way to becoming the rightful prerogative of the powerful. The thought of extending the American border southward was to some legislators not only a necessity but a right. This attitude which was to take precedence over customary rules of international law, cannot be ignored if we are to examine the Panama situation in its true light.

At the close of the Spanish-American War, the canal fever was at its peak. Dwight Miner describes the prevailing mood aptly:

> As the opening of Congress drew near, the canal sentiment gained in momentum with the public and the press. The peace negotiations in Paris during the fall had caused much debate on the wisdom of acquiring overseas possessions. Foes of the administration cried "imperialism" while its defenders hurled back lines from Kipling. But on the subject of the canal there was remarkable unanimity. Its benefits would be not only strategic but commercial . . . Petitions poured in upon congressmen from boards of trade and shipping associations, from civic and patriotic socieities. The country was prosperous and confident; it had acquired new authority in international affairs. It was in a mood to link the oceans.[29]

As soon as the Hay-Pauncefote Treaty was signed in 1901, freeing the United States from the obstructive Clayton-Bulwer Treaty, the State Department proceeded to take steps for obtaining the necessary privileges from the country through which the canal was to be built. In June of 1902, the Spooner Act was passed by Congress authorizing the President to purchase the concessions and property of the New Panama Canal Company (French Company) and to acquire from Colombia perpetual

control of, and jurisdiction over a six-mile wide strip of land across the Isthmus of Panama. If after a "reasonable time" he was unable to obtain these privileges, the Act authorized him to secure control of the necessary territory from Costa Rica and Nicaragua and proceed with plans for the construction of a canal across Nicaragua.[30]

The Government of the United States had by this time become fully convinced of the superiority of the Panama route,[31] and all that remained was to enter into negotiations with Colombia.

As mentioned previously, the United States, in accordance with the Treaty of Nueva Granada of 1846, had guaranteed to Colombia the "perfect neutrality" of the Isthmus as well as the rights of sovereignty possessed by Colombia over that Isthmus. In return, Colombia guaranteed to the United States that the rights of transit across the Isthmus would not be interrupted.[32]

In order to properly evaluate the events that were to take place during the independence movement of 1903, it is necessary to examine the circumstances surrounding the interpretation of Article XXXV and the happenings that led to its violation.

CHAPTER II

THE INTERVENTION

On the evening of April 15, 1856, a serious riot occurred in Panama as a result of the refusal of a drunken American passenger from the steamer Illinois, to pay for a slice of watermelon purchased from a negro fruiterer at the railway station in Aspinwall (now Colon). Before the riot was stayed some eighteen passengers were killed and the loss of the foreigners in property amounted to half a million dollars. The United States promptly demanded an indemnity from Nueva Granada, insisting upon the obligation of the latter, under the Treaty of 1846, to secure to the government and citizens of the United States a free and open transit.[33]

The prevalence of lawless acts on the transit line continued, and the failure on the part of Colombia to maintain order in that area placed the task of maintaining the transit route open on the United States. In his Annual Message on December 2, 1856, President Pierce made it clear that due to the violence and Colombia's inaction, it was his duty to "station part of the [United States'] naval force in the harbors of Panama and Aspinwall in order to protect the persons and property of the citizens of the United States . . . and insure them safe passage across the Isthmus."[34]

The difficulty at this time seemed to be limited to the maintenance of the free transit. The Isthmus, however, had been beseiged by countless insurgencies, riots and revolts from as early as 1850, and requests from the Colombian Government for the landing of American troops to preserve public order were refused. In 1866, when Panama once again made an effort at securing its independence from Colombia, the State Department was cautious of any American involvement. "The United States," Secretary Seward maintained, "has always abstained from any connection with questions of internal revolution in the State of Panama . . . and will continue to maintain a perfect neutrality to such domestic controversies."[35]

While the United States did in fact refuse to involve itself in the internal affairs of Colombia during this time, troops had been landed on the Isthmus as early as 1856--with the consent of the Colombian authorities. At that time one hundred and fifty men were deployed for three days to protect American citizens from the dangers of a local disorder.[36] Prior to that year, war vessels were requested by Colombia on four separate occasions and refused (1850, 1851, 1853, 1854), since the disturbances were of a local nature and had not threatened the transit route.[37] Four years later in 1860, United States forces were again landed to protect American lives and property during an insurgence, at the request of authorities. Similar action was taken in May of 1861, June of 1862, March of 1865, September of 1873, 1855 and early in 1901.[38]

In these seven instances it appeared that American

"intervention" always occurred with the consent of Colombian authorities, and in order to protect the transit route and/or the safety of American citizens. Conditions in the area seemed to warrant this action,[39] and Colombia, when it did not request such assistance, gave its consent.[40]

An exception occurred during the Civil War of 1901-1902. Fighting had spread along the railway lines in November of 1901 between the government and insurgents, and armed guards from the U.S.S. Iowa and U.S.S. Marietta were put on board the trains, the use of which was denied to both the government and rebel forces. On January 20, 1902, the captain of the U.S.S. Philadelphia instructed the Colombian vessel, Almirante Padilla, which was then entering the harbor of Panama, that no firing from his vessel must endanger foreign shipping in the port and that there must be no bombardment. In September of 1902, the commander of the U.S.S. Cincinnati informed both the government and revolutionary forces that, in order for the transit route not to be obstructed, no armed men except forces of the United States would be allowed to come upon or use the line.[41]

It would seem reasonable to assume that the nature of the United States' involvement with Colombia deteriorated through various stages. While assistance was refused the Government of Colombia between 1850 and 1856, it was rendered after that date only at the request of, or with the consent of the local Colombian authorities, and in order to protect the transit route and property. After 1901, the United States

landed troops without the permission of Colombian authorities, though still doing so in order to keep the transit route free. In 1902, the involvement reached another stage. Rear Admiral Casey of the Navy observed on a trip across the Isthmus that the quartering of government soldiers in railway cars was resulting in unsanitary conditions, and that for this and "other" reasons he was forced to "decline the transportation of any combatant or any ammunition and arms over the road which might cause an interruption of traffic or convert the line into a theatre of hostility." Both the Colombian Government and the revolutionary forces protested, the former considering such an act as "an invasion of its sovereign and treaty rights."[42] The American Government promptly acquiesced, Secretary Hay informing the Colombian Government through the American Minister at Bogota that there had been "no intention to infringe [the] sovereignty or wound [the] dignity of Colombia."[43]

The stage was now set for the events that were to lead to the independence of Panama in 1903. Conditions in Colombia were now at a critical point and the political, economic and social conditions were disastrous as a result of the civil wars and general neglect that had prevailed in that area for more than half a century. Colombian President Marroquin aptly described the situation in 1898:

> Hatred, envy and ambition are elements of discord; in the political arena the battle wages fiercely . . . public tranquility . . . is gradually becoming unknown; we live in a sickly atmosphere; crisis is our normal state; commerce and all other industries are in urgent need of perfect calmness for their development and progress. Poverty invades every home.[44]

On the Isthmus itself, "independence fever" was rising at a high pitch. Prominent Isthmians were meeting secretly and plans were being laid carefully in the hope that Washington would assist in freeing Panama from Colombia.[45] At the White House, President Roosevelt had by now adopted an almost obsessive concern for the canal project, and it is to his participation that we must now turn our attention.

On January 22, 1903, the Hay-Herran Convention was signed between the United States and Colombia. This convention was to authorize the French Company to sell its properties to the United States, the latter obtaining full control over a strip of land six miles wide across the Isthmus for the construction of a ship canal. This was to be a ninety-nine year arrangement renewable for similar periods at the option of the United States. In return the United States promised to pay in cash $10,000,000 in gold and an annuity of $250,000 in gold beginning nine years after the exchange of ratifications. The treaty was ratified by the American Senate two months later on March 17, 1903.[46]

Colombia at once found the treaty objectionable, and the delay on the part of the Colombian Government to ratify it incurred the wrath of the State Department--and especially of Theodore Roosevelt. The latter was irritated at the whole turn of events and was desirous of carrying out the canal task at any cost, notwithstanding the Treaty of 1846 and its impediments. Throughout the negotiations, the American Government gave frequent evidence of insistence and impatience at any

delay caused by Colombia, and of an agressiveness rarely found in diplomatic intercourse.[47] The dispatches show an utter disregard of the Colombian people or their representatives and a fixed determination to secure ratification of the treaty, to such an extent that veiled threats of retaliation were advanced in case the treaty should be rejected. Secretary Hay's telegram to the American Minister in Bogota read in part:

> If Colombia should now reject the treaty or unduly delay its ratification, the friendly understanding between the two countries would be seriously compromised that action might be taken by the Congress next winter which every friend of Colombia would regret. Confidential. Communicate substance of this verbally to the Minister of Foreign Affairs.[48]

President Roosevelt in his note to Secretary Hay, on July 13, 1903 was more to the point:

> Make it as strong as you can to Beupré [American Minister at Bogota]. Those contemptible little creatures in Bogota ought to understand how much they are jeopardizing things and imperilling their own future.[49]

Whether Roosevelt at this time was contemplating a seizure of the Isthmus by force should the treaty be rejected remains to this day a matter of speculation. His determination, however, left little doubt as to his intentions. It was his opinion that such a grand scheme could not be stalled by any means, including diplomatic niceties, the territorial sovereignty of Colombia or the existence of an impedimental treaty.

The Hay-Herran Treaty was unanimously rejected by the Colombian Senate on August 12, 1903.[50] A few days before, Roosevelt had been sent a memorandum from John Bassett Moore, prominent international lawyer and an acquaintance of President Roosevelt, regarding the American position under Article XXXV

of the Treaty of 1846, which Secretary Hay had found "important," in case the canal had to be built "without Colombia's leave."[51]

Moore argued that in view of the fact that the United States had for more than fifty years secured to Colombia her sovereignty over the Isthmus in order to keep the transit route open, the United States was in a position to demand that it should be allowed to construct the means of transit which the treaty was meant to assure. He maintained that the Treaty of 1846 gave the United States the inherent right to construct the waterway. Moore made no mention of any right on the part of the United States to seize the Isthmus or to take any forcible measures should Colombia fail to ratify the Hay-Herran Convention, but he stressed Colombia's "implicit" obligation to continue negotiations until an agreement was reached.[52]

This was all Roosevelt needed. One week after the treaty had been rejected, he wrote to Secretary Hay:

> If under the Treaty of 1846 we have a color of right to start in and build the canal, my offhand judgment would favor such proceeding. It seems that the great bulk of the best engineers are agreed that the route is best; and I do not think that the Bogota lot of jack rabbits should be allowed permanently to bar one of the future highways of civilization.[53]

Hay was also enthused by the Moore Memorandum, but cautioned Roosevelt that

> the fact that our position in the case would be legal and just might not greatly impress the jack rabbit mind. I do not believe we could <u>faire valoire</u> our rights in that way without war--which would of course be brief and inexpensive.[54]

During September, Roosevelt consulted at length with

John Bassett Moore,[55] regarding interpretations of Article XXXV, and as of that date seemed more impulsive than ever. On October 5 he wrote to Senator Hanna:

> I am not as sure as you are that the only virtue we need exercise is patience. I think it is well worth considering whether we had not better warn those cat-rabbits that great though our patience has been, it can be exhausted . . . I feel that we are certainly justified in morals and therefore justified in law, under the Treaty of 1846, in interfering summarily and saying that the canal is to be built and that they must not stop it.[56]

In anticipation of trouble on the Isthmus, United States Army Officers in Panama, disguised as civilians, mapped possible offensive and defensive positions.[57] On October 6, Roosevelt interviewed Captain Humphrey and Lieutenant Murphy of the United States Army on their observations and impressions of the Isthmian situation,[58] and three more observers were dispatched to Panama. The U.S.S. Dixie was ordered to load marines and sail from League Island on the 23rd, and the next day the U.S.S. Nashville was ordered to proceed to Kingston, Jamaica. Other navy ships were ordered to sail south from San Francisco under sealed orders.[59] By November 3, the American fleet that converged upon the Isthmus included the Dixie, Nashville, Atlanta, Maine, Mayflower, Marblehead, Wyoming, Boston and Concord.[60]

The Panamanian Junta's plans were undoubtedly based on the expectation of American assistance. The Colombian army in Panama consisted of some 1500 well-equipped veterans, with some 5000 more awaiting instructions in Bogota, while the revolutionary forces consisted of less than three hundred members of the Panama Fire Brigade reinforced by a handful of policemen.[61]

The plans did not involve a Panamanian triumph on the battlefield, but rather on the opportune appearance of American warships to prevent the passage of Colombian troops onto the Isthmus.

In exchange for the title of Minister Plenipotentiary of Panama to Washington for negotiation of the canal treaty, the Frenchman Philippe Bunau-Varilla promised Dr. Manuel Amador Guerrero (prime spokesman for the revolutionary movement and subsequently Panama's first President) $100,000 to defray the immediate expenses of the revolution and his guarantee of United States military assistance. Bunau-Varilla, formerly chief engineer for the French Company, had been the brain and the influence behind the entire conspiracy. Amador was reluctant to grant this honor on a Frenchman, but rather than risk the loss of Bunau-Varilla's assistance he finally consented and Bunau-Varilla left immediately for Washington.[62]

News of the imminent uprising soon reached Bogota, and Colombian forces were immediately dispatched. In haste, Amador cabled Bunau-Varilla in their private code:

FATE NEWS BAD POWERFUL TIGER
URGE VAPOR COLON.

Translated, the message read:

> We have news of arrival of Colombian forces by Atlantic in five days more than two hundred. Urge warship for Colon.

Bunau-Varilla rushed to Assistant Secretary of State Loomis, and on October 30 sent his reply back to Amador:

> Thirty-six hours Atlantic, forty-eight Pacific.

The Navy Department wired the warships and they promptly arrived on schedule.[63]

On November 2, the Acting Secretary of the Navy wired the Nashville, care of the American Consul in Colon:

> Maintain free and uninterrupted transit. If interruption threatened by armed force, occupy the line of railroad. Prevent landing of any armed force with hostile intent, either government or insurgent, either at Colon, Porto Bello, or other point. Send copy of instruction to the Senior Officer present at Panama upon arrival of Boston. Have sent copy of instructions and have telegraphed Dixie to proceed with all possible dispatch from Kingston to Colon. Government force reported approaching the Isthmus in vessels. Prevent their landing if in your judgment this would precipitate a conflict.[64]

The next day Hay received a telegram from the American Consulate in Colon:

> Revolution imminent. Government force on Isthmus about 500 men. Their official promised support revolution. Fire department Panama, 441, are well organized and favor revolution. Government vessel, Cartagena, with about 400 men, arrived early today . . . was not expected until November 10 . . .[65]

It appeared that the original orders had gone astray and a Colombian force had landed in Colon with no opposition. Though the local government force had already been bribed into supporting the revolution,[66] the Navy Department became worried and recabled the Nashville with similar orders to the other warships.

> In the interest of peace, make every effort to prevent government troops at Colon from proceeding to Panama.[67]

The uprising took place on the afternoon of November 3, 1903, the only casualty being a chinaman killed in his home as a result of shelling from the Colombian gunboat Bogota. Upon hearing of this, the Secretary of the Navy immediately

cabled the closest warship, Boston, to "prevent recurrence bombardment of Panama."[68] The day after the uprising, the Commanding Officer of the Nashville wired the Secretary of the Navy:

> Provisional government was established at Panama Tuesday evening; no organized opposition. Governor of Panama, General Tobar, General Amaya, Colonel Morales and three others of the Colombian government troops who arrived Tuesday morning taken prisoner at Panama. I have prohibited transit of troops now here across the Isthmus.[69]

Amador wasted no time. He and his associates issued a declaration of independence, unfurled the tricolor flag sewn by Bunau-Varilla's wife, and waited for the United States to make the whole affair effective. While the Bogota was still in sight, Federico Boyd, Agustin Arango and Thomas Arias were appointed to organize the government. This fact was telegraphed to Secretary Hay on the night of November 4.[70]

The plentiful exchange of telegrams during this time left no doubt that the United States maintained full and effective control over the Isthmus and its rebellion. When Dr. Amador made his appearance at the Central Plaza on November 4, carrying the new Panama flag, he was flanked by the United States Acting Consul-General Felix Ehrman, who bore the Stars and Stripes. The Panama standard was later hoisted by Major William Murray Black, of the United States Army.[71] Amador, in ecstasy, shouted, "The world is astounded at our heroism. Yesterday we were but slaves of Colombia; today we are free. President Roosevelt has made good. Long live the Republic of Panama! Long live President Roosevelt!"[72]

Two days later, on November 5, Ehrman wired Hay after

receiving "an official circular letter" from the provisional government regarding the withdrawal of Panama from the Republic of Colombia. On the next day Hay wired back a classic message:

> The people of Panama have, by an apparently unanimous movement, dissolved their political connection with the Republic of Colombia and resumed their independence. When you are satisfied that a de facto government, republican in form, and without substantial opposition from its own people, has been established in the State of Panama, you will enter into relations with it as the responsible government of the territory.[73]

At the same time Hay cabled the American Minister at Bogota and the Colombian government advising them that the United States had on that day already entered into diplomatic relations with the new government in Panama.[74]

The coup was now complete and the United States promptly recognized the new government. Despite the existence of a treaty by whose terms the United States guaranteed the sovereignty of Colombia over the Isthmus, the American Government lent massive assistance to Colombia's insurgents and in effect brought about the independence of Panama. The United States Navy had tacitly prevented the landing of government troops onto the Isthmus on at least five separate occasions before the Revolution of 1903, and at the time of the rebellion, nine warships harbored on the Atlantic and Pacific port cities together with troops landed on the Isthmus, prevented Colombia from taking any action whatever on its own territory.

CHAPTER III

THE LEGALITY OF THE COUP: INTERVENTION AND RECOGNITION

Justifications for the American participation in the events of 1903 have ranged from legal and moral considerations to the simple and outright exercise of a duty on the part of the United States. Condemned or defended for over sixty years, the nature of the creation of Panama remains today a source of strife among its inhabitants and a major subject of conflict in that state's relations with the United States. In order to grasp the impact of these events, it is necessary to view them now in the light of international law.

According to Article XXXV of the Treaty of 1846, the Colombian Government had guaranteed the United States that the right of passage across the Isthmus would not be interrupted. The United States in turn, had guaranteed to Colombia the neutrality of the Isthmus and Colombia's rights of sovereignty and property over that territory.

An unparalleled flexibility in the interpretation of these clauses was advanced by Roosevelt as sufficient reason for depriving Colombia of her rights under the Treaty. While the right of passage was guaranteed--a clause that was construed as granting to the United States a right to build a canal--it would appear that any flexible interpretation of

that right was checked by the subsequent clause guaranteeing Colombia's sovereignty over that area. This first clause, however, together with an interpretation as to the purpose of the treaty constituted the main sources of contention in justifying the American Government's actions.

The views held by Theodore Roosevelt and John Hay were founded on the arguments presented them by John Bassett Moore. In seeking to establish a "color" of right, the President sought his comments during the ill-fated negotiation of the Hay-Herran Treaty. Moore's claim of America's "right" to construct a canal across the Isthmus under the Treaty of 1846 was based on his arguments that (1.) Colombia could not stand in the way of a project that would be of such significant benefit to the rest of the world; (2.) that the prime purpose of the Treaty was for the eventual construction of the canal by the United States; (3.) that the United States had faithfully executed its obligations since the ratification of the Treaty and (4.) that the mention in Article XXXV of the free and open transit for the citizens and for the Government of the United States meant that the route could be used by the Government itself, persons in the military and civil service and for its property, thereby granting the United States a "license" to construct a canal.[75]

The contention that Colombia could not stand in the way of such a grand design would appear in itself an admission of a right to act beyond the stipulations of the Treaty. That is, that the exercise of some form of eminent domain is

of a higher order than the observance of a treaty. It has since been argued that this was indeed the basis upon which the United States acted--as a trustee for the world. Hugh Gordon Miller, one time Special Assistant to the United States Attorney General, defends this contention, arguing that "only as a trustee for interests larger than her own . . . [the United States] had an equitable right to act as she did act."[76]

Roosevelt held this view from the beginning, arguing that he was "bound not merely by treaty obligations, but by the interests of civilization"[77] and claiming that "the possession of a territory fraught with such peculiar capacities as the Isthmus . . . carries with it obligations to mankind."[78]

Such a contention implies an involuntary restriction on a state's sovereignty and in the eyes of the injured state, a clear act of intervention. In this sense it can find no justification in international law. The norm of general international law which is the legal basis of all treaties, pacta sunt servanda[79] cannot find any limitation under the concept of eminent domain.

Closely related to this contention, and certainly implied by Roosevelt, in his arguments, is the justification of such actions under the concept of "humanitarian intervention," a theory expounded on as early as Grotius[80] but obtaining distinct flavor during the nineteenth century. Ellery Stowell in his substantial study of Intervention in International Law, defined this form of intervention as

> the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of authority within which the sovereign is presumed to act with reason and justice.[81]

While there has existed much controversy among authorities regarding its legality, the concept in most cases has been centered about tyrannical acts, religious persecution, extreme cruelty and acts contrary to the "laws of humanity."[82] A number of instances during the nineteenth century of such interventions concerned the "justifications" mentioned above.[83] The concept, however, is one easily leading to abuse, and no doubt was one of several characterizations offered in circumstances which more frequently than not indicated the presence of selfish motives. As Brownlie argues,

> Examination of state practice in relation to this form of intervention is rendered difficult as it is frequently a subsidiary justification for an intervention which is an expression of purely national policy.

According to Brownlie, state practice justifies the conclusion that no case of humanitarian intervention has occurred. He argues that such a policy "belongs to an era of unequal relations" and that most authorities either ignore the concept or expressly deny its tenets.[84]

As stated, however, and irrespective of the views of authorities concerning its legality, the concept of humanitarian intervention embraced situations which for reasons of cruelty or abuse demanded such action "on behalf of humanity."

It would be difficult to argue that Roosevelt's desire to see an interoceanic canal across Panama constituted grounds for humanitarian intervention.

The allegation that the prime purpose of the Treaty was for the eventual construction of a canal was probably Roosevelt's main claim. In 1904, he stated:

> It was the opinion of eminent international jurists that in view of the fact that the great design of our guarantee under the Treaty of 1846 was to dedicate the Isthmus to the purposes of interoceanic transit, and above all to secure the construction of an interoceanic canal, Colombia could not under existing conditions refuse to enter into a proper arrangement with the United States to that end without violating the spirit and substantially repudiating the obligations of a treaty the full benefits of which she had enjoyed for over fifty years.[85]

Secretary Hay expressed a similar, yet more constrained view:

> It is true that the Treaty did not require Colombia to permit such a passage to be constructed; but <u>such an obligation was so obviously implied that it was unnecessary to express it</u> . . . The guarantee by the United States of the neutrality of the Isthmus and of the sovereignty and property of New Granada thereover, <u>was given for the conservation of precisely this purpose</u>.[86]

It might be readily said that such was the purpose of the United States in entering into negotiations with Colombia, Nicaragua and Great Britain over a period of more than fifty years, but such cannot be construed as being the purpose of this particular treaty. The overall aim and purpose of the Nueva Granada Treaty was essentially a commercial one (President Polk regarded it "not as an alliance for a political object, but for a purely commercial interest"--see no. 14 above), in which Colombia agreed to allow the United States all the exemptions, privileges and immunities of commerce to its merchandise and citizens in their transit across the Isthmus. No mention is made of any future right or project on the part

of the United States to construct a canal. In fact the only instance in which a canal is mentioned places such a possibility in the hands of the Colombian Government. According to Article 35.1,

> No other tolls or charges shall be levied or collected upon the citizens of the United States or their merchandise thus passing over any road or canal that may be made by the Government of New Granada or by the authority of the same, than is under like circumstances, levied upon and collected from the Granadian citizens.[87]

To have imputed such a purpose on a treaty of this nature was to seek an interpretation for which no basis was provided. The question in this instance is not one of ambiguity, since with regard to the aim and purpose of the Treaty, such is clearly stated at the outset and no provision exists in the Treaty from which the American contention can be implied. Had it been the intention of the United States in concluding this treaty to make that convention an instrument directed towards the purpose claimed, some expression to that effect should have appeared in the document. A treaty should be interpreted in the light of the general purpose which it is intended to serve, and if the intention at the time of its negotiation (1846) was the construction of an interoceanic canal, that purpose should have been expressed in the treaty itself.[88]

The claim that the United States had faithfully executed its obligations since the ratification of the Treaty and had in fact bound itself to intervene in order to keep the transit route open since Colombia was unable to do so, was construed by Roosevelt as a failure on the part of Colombia in living up to its obligations, therefore allowing the United

States to rescind its guarantees also. This, in effect, was a claim on the part of the American Government of its right to abrogation of the Treaty as a result of non-execution by Colombia.

To begin with, it would be difficult to construe Colombia's failure as a true breach. First of all, Colombia appeared to have acted in good faith. That is, its failure to maintain the transit route free was caused, not by Colombia's intent, but by her inability in carrying out this obligation due to severe internal strife. Such a situation in theory might not constitute a sufficient cause to excuse Colombia from her obligations but neither can it be construed as a fundamental breach of the Treaty or as a willful attempt by that country to discontinue the performance of its obligations. Second, it could be argued that no breach did in fact occur, since Colombia being unable to maintain the transit route open, requested assistance from the United States in doing so, an act that the latter was able to perform. Third, Colombia had been unable to carry out its guarantee for over fifty years, while the United States itself agreed to do so for that length of time. Had a fundamental breach by Colombia in fact occurred, the right of abrogation by the injured party should have been pursued within a reasonable amount of time after the breach (The Time-lapse Theory).[89] The United States had for over fifty years received the full benefits of the executed obligations and a retaliatory breach at the end of that time could not be considered as justified.

The contention by Moore that the use of the word "government" meant that the route could be used by its "persons" and "property" thereby implying a "license" to build the canal presents a more credible argument, which, taken as an isolated provision, could appear ambiguous, but that nevertheless contradicts the guarantees of Article XXXV as well as the aim and purpose of the Treaty. The claim more aptly falls under McNair's term, "leaning against the creation of unusual rights," which he uses to describe similar allegations. One can also argue that such an argument is contrary to the rule of in dubio mitius; that is, that in the case of ambiguity the meaning should be preferred which is less onerous to the obligated party and causing less interference with its personal and territorial supremacy.[90] While it is true that every treaty obligation limits the sovereign power of a state to some extent, an interpretation which seeks to create restrictions on the exercise of a state's sovereign rights in the absence of any stipulations to that effect cannot be deemed valid, particularly in view of the fact that this ambiguity is checked by a subsequent provision guaranteeing that state's sovereignty over the area in question.

It should be made clear, however, that Moore never took the view that the American Government's "license to dig" was a right that could be exercised without Colombia's leave. He never suggested the question of a revolt nor the action to be taken in that event.[91] It seems that Roosevelt seized upon Moore's comments, arguing that "the Government of the

United States would have been guilty of folly and weakness, amounting in their sum to a crime against the nation had it acted otherwise than it did," and claiming that "the great enterprise of building the interoceanic canal cannot be held up to gratify the whims or out of respect to governmental impotence."[92]

Such manifestations, centered about his earlier claim that "we are certainly justified in morals, and therefore justified in law under the Treaty of 1846, in intervening,"[93] leave little cause for an attempt at establishing legal justifications.[94]

The manner, in which negotiations of the Hay-Herran Treaty were carried out with Colombia, warning that nation that "grave consequences might follow from her rejection of the Treaty,"[95] and the cooperative dealings with the Panamanian revolutionaries leave much doubt as to any noble intentions the American Government may have entertained. It was well known in Colombia that the President of the United States was empowered by Article 4 of the Spooner Act, to take steps for the construction of the canal across Nicaragua, if Colombia failed to ratify the Treaty. This naturally was regarded as a sanction by Colombia[96] and the American State Department did not hesitate in having this threat so construed. Article XXVII of the Hay-Herran Treaty, stipulates clearly the requirement of ratification,[97] and it is a recognized principle of international law that in the case of a treaty where the requirement of ratification is clearly expressed before such a

treaty is to become operative, there exists no legal or moral duty upon a state to ratify that instrument.[98]

It appears inconceivable that such arguments could have been advanced repeatedly to justify the American action. Had these acts of intervention taken place solely for the purpose of maintaining a free and open transit and for the protection of American lives, Roosevelt's policies would have been presented in a more credible framework; but when the result of this intervention was the dismemberment of Colombian territory and the outright breach of a treaty, the imagination must be stretched beyond any considerations of liberal interpretation in order to contend that a right to free and open transit authorized such actions. In so acting, the United States failed to exercise any appreciable degree of reasonableness and good faith in its observance of the Treaty of 1846 and in its dealings with the Colombian Government. Instead, it chose to act in a manner that was to excite historical criticism and display to the world little more than an advanced form of imperialistic policies.

On the other hand, it cannot be said, as it is often alleged, that the Isthmus itself or the people of Panama were victim to any acts inflicted upon them by the United States. The Isthmus had long desired its independence and had made over twenty separate attempts over a fifty-year period. The people of the Isthmus collaborated closely with the United States in perpetuating this <u>coup</u>, and at no time did there appear to be any discord in this regard. Panama welcomed the

American presence and for justifiable reasons. The hope of achieving independence and becoming a party to the construction of an interoceanic canal across its principal cities was a cause few could disparage. That the independence move was genuine cannot be disputed, but there would not have been the vaguest hope of success without intervention by the United States. Panama wanted its independence and longed for the honor of a canal, and the United States was prompt to assent.

The wrong then, was suffered solely by Colombia and perpetrated both by the United States State Department and the conspirators on the Isthmus. Members of the revolutionary Junta planned their strategy while in close contact with Washington and with the aid of the American observers in Panama, the only "unplanned" incident being the shelling from the Colombian gunboat Bogota.[99]

Even after the coup, the United States did not allow Colombia any satisfaction whatever. On November 7, the United States Legation at Bogota cabled Hay on behalf of the Colombian government for permission to land Colombian troops in order to suppress the rebellion and therefore allow Colombia to maintain her sovereignty on the Isthmus in accordance with Article XXXV of the Treaty. Hay waited four days before replying, refusing permission for the landing and reiterating the fact that the insurgent government had been recognized by the United States on November 6.[100] Upon receipt of Hay's telegram informing the Colombian Government of the recognition of Panama, Dr. Herran had immediately lodged a formal protest to

the American Government claiming a breach, on the part of that government, of the Treaty of 1846. Hay promptly acknowledged the protest with no further comment.[101]

One month later the Colombian Government, in a message to Hay, inquired from him "what attitude would be assumed by the Government of the United States" if Colombian troops appeared on the Isthmus in order to defend its sovereignty in accordance with Article XXXV. Hay replied by reiterating the "fact" of Panama's independence and recognition, and stating that any appearance of Colombian troops on the Isthmus would be viewed by the United States as an invasion of the territory of Panama. He also advised the Colombian Government that "the time has come, in the interest of universal commerce and civilization, to close the chapter of sanguinary and ruinous civil war in Panama."[102]

Having so silenced Colombia, it was not until a decade later that the United States gave the former some measure of satisfaction by means of a treaty expressing regrets and granting Colombia $25,000,000 in gold in exchange for her recognition of Panama.[103] There can be little doubt that such a treaty was, in effect, an ex post admission of the illegal acts of 1903.

Aside from the violation of the Treaty of 1846, and the nature of the American Government's dealings with Colombia, the hasty recognition of the Panamanian Government by the United States also invited strong criticism. At the time of its recognition (de facto recognition was granted three days after

the rebellion, with de jure recognition following a week later), Panama had no established government and no means of carrying out or maintaining its independence. It had only a provisional "government" consisting of a handful of prominent citizens, an executive board of three men and the promise of prompt recognition and assistance by the United States.[104]

While theories regarding recognition of states vary and there exist no definite rules as to when recognition should be granted, there has been a surprising degree of unanimity among jurists as to the basic conditions necessary for the recognition to be valid. Basically, there is general agreement that recognition must not be granted where the basic conditions of statehood are absent,[105] so long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal,[106] or when that state is not able to maintain its independence and is not safely and permanently established.[107] Lauterpacht refers to these aptly, as the requirements of "external independence and internal stability,"[108] both of which were notably absent when Panama was recognized. When recognition is granted a state in the absence of such conditions, it is generally agreed that such a recognition is premature and as such illegal.[109] Lauterpacht and Chen maintain that in addition to being a breach of international law, premature recognition constitutes an intervention in the domestic affairs of the parent state.[110] Even the initial success of the rebellion does not establish the independence of the insurgent community in a manner to make recognition

justifiable;[111] some time must be allowed to elapse in order to permit that community to demonstrate the permanency of its success. Theodore Woolsey maintains that

> The new government must establish its ability to perform all the duties and maintain the rights of a state . . . It must appear that the parent is making no effort, and is unlikely to make any effort in the near future to coerce the revolutionary body; thus, time is the essence of the question--time for testing the new state's stability, its popular backing, its freedom from outside control, its independence as an assured fact.[112]

Lauterpacht maintains a similar view, arguing also that "[international law] . . . forbids third states to favor insurrection by recognizing the insurgents as a state before they have succeeded in establishing themselves beyond all reasonable doubt."[113] Chen argues quite appropriately in this case that "political considerations become objectionable only when manifested in actual conduct, such as in premature recognition . . . or in offering recognition as a price for political concessions. Such practices are rightly to be condemned. Premature recognition should properly be considered as a species of intervention, rather than recognition.[114]

The presumption in favor of the lawful government and the general condemnation of premature recognition seem to be above controversy.[115] The United States, then, in recognizing the Republic of Panama within three days of its rebellion, while tacitly preventing the Colombian Government from quelling such a revolt within its own territory, and granting this recognition to a territory void of any of the most basic requirements of statehood, acted in a hasty and questionable manner

resulting in the premature recognition of the Republic of Panama and in an unlawful act of intervention toward the Government of Colombia. The assertion by the United States that it was acting in the interests of "collective civilization" cannot be regarded as creating a new rule of international law.

In actually aiding the rebellious portion, preventing the lawful government from exercising its sovereignty on the Isthmus, and in landing troops in order to guarantee the success of the rebellion, the United States precipitated a flagrant breach of the Treaty of 1846, an action for which there existed no legal justification whatever.

In attempting to coerce the Colombian Government during negotiations of the Hay-Herran Treaty prior to the revolution, and in disregarding that government's protests as a result of the intervention during and after the rebellion, the American Government failed to display any semblance of good faith toward Colombia. The attitude assumed by President Roosevelt and John Hay injured not only the state of Colombia, but allowed the rest of Latin America to witness the change of the Monroe Doctrine from a policy of protection of the Americas against Europe, to one of intervention and aggression by the United States.

It has often been argued that the American intervention served Colombia right; that the area was governed by incompetent and blundering politicians, and that the United States had put up with it for as long as it should; that only the United States was capable of constructing and maintaining the

waterway; that if the people of Panama wanted their independence, it was proper for the United States to aid them, and that nothing should have stood in the way of such a grand design to begin with. This appeared to be not only "a man in the street" verdict but one endorsed repeatedly by the State Department as well. As late as 1913, the prominent American statesman and former Secretary of State, Elihu Root, told the United States Senate that "we base our title upon the right of mankind in the Isthmus, treaty or no treaty."[116]

This verdict, however popular at that time, set a precarious precedent for American foreign policy, for despite the fact that the United States had violated those generally-accepted rules of international law, the fact also remained that such a powerful wrongdoer could not be brought to book by a feeble sufferer.

As far as the newly-recognized Panama was concerned, it had succeeded admirably in its plans. It had acquired its long-sought freedom, the guarantee of an interoceanic canal and the protection of the strongest nation in the Hemisphere. However, the step that was to come within two weeks of the rebellion, the signing of the new Hay-Bunau-Varilla Canal Treaty, was to have more political repercussions than Amador and Roosevelt ever dreamed of, for the little state that shouted "viva los Americanos" in 1903 was soon to cry the more familiar "Yanqui go home!"

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[1]Hugh Gordon Miller, The Isthmian Highway (New York, 1929), p. 7.

[2]Ibid.

[3]Rolt Hammond and C. J. Lewin, The Panama Canal (London, 1966), p. 11.

[4]The terms "Middle America" and "Central America" are used by some writers in referring only to the five nations south of Mexico and north of Panama (excluding Panama), considering Panama as a single geographical area or as part of South America. The more recent trend has been to consider it as being within "Central America." See for example Harry Robinson, Latin America, A Geographical Survey (New York, 1967), p. 170.

[5]Hubert Herring, A History of Latin America (New York, 1962), p. 252.

[6]Ibid., p. 501.

[7]Ramon M. Valdés, La Independencia del Istmo de Panama (Panama, 1903), pp. 4-5; David Howarth, Panama (New York, 1966), p. 224; A. Curtis Wilgus and Raul D'eca, Latin American History (New York, 1966), p. 221.

[8]Herring, op. cit., p. 509.

[9]Wilgus and D'eca, op. cit., p. 222; see also William D. McCain, The United States and the Republic of Panama (New York, 1965), p. 7.

[10]Mr. Clay to Mr. Anderson and Mr. Sargent, May 8, 1826, Francis Wharton, Digest of International Law of the United States, Vol. III, (Washington, D. C., 1886), p. 1.

[11]Harmond Arias, The Panama Canal (London, 1911), p. 15.

[12]Ibid.

[13]Diogenes A. Arosemena G., (ed.), Historia Documental del Canal de Panama (Panama, 1962), pp. 35-38. (Translation and italics mine.) Hereinafter cited as Historia Documental.

[14]Message of President Polk to the U. S. Senate, Feb. 10, 1847, A Compilation of the Messages and Papers of the Presidents, Vol. V, (New York, 1897), p. 2362. Hereinafter cited as Messages and Papers.

[15]McNair, discussing the effect of secession on treaty obligations, states with regard to Panama: "Since the province of Panama revolted from Colombia and established its independence in 1903, the view adopted by the British Government appears to have been that Panama was a new State and was no longer bound by the then existing treaties between Great Britain and Colombia." See Sir Arnold McNair, The Law of Treaties (Oxford, 1961), pp. 600-602. The question as to whether Panama would have been bound by the Treaty of 1846 after its secession from Colombia, due to the fact that the agreement created local obligations on the Isthmus, would have posed an interesting situation had any of the governments concerned chosen to challenge it.

[16]Mary W. Williams, Anglo-American Isthmian Diplomacy (Washington, D. C., 1916), pp. 46-68.

[17]Treaties and Acts of Congress Relating to the Panama Canal (Mount Hope, Canal Zone, 1922), pp. 13-15. Hereinafter cited as Treaties and Acts of Congress.

[18]Dwight Carroll Miner, The Fight for the Panama Route (New York, 1966), p. 18; Arias, op. cit., p. 49.

[19]Earl Harding, The Untold Story of Panama (New York, 1959), p. 2.

[20]Ibid., p. 5.

[21]Message of President Hayes to the U. S. Senate, Mar. 8, 1880, Messages and Papers, Vol. X, pp. 4537-4538.

[22]Ibid. (Italics mine.)

[23]McCain, op. cit., p. 10; see also Howarth, op. cit., pp. 187-214.

[24]Miner, op. cit., pp. 21-22.

[25]Harold V. Faulkner, American Political and Social History (New York, 1957), p. 662.

[26]Miner, op. cit., pp. 28-29; see also Faulkner, op. cit., pp. 660-670, for a discussion of overseas expansion during this time and of the concept of "manifest destiny," which became the popular justification for the extension of the United States' boundaries.

[27]Arias, op. cit., pp. 55-56.

[28]Treaties and Acts of Congress, p. 16.

[29]Miner, op. cit., p. 83.

[30]Historia Documental, pp. 149-155. (Translation mine.)

[31]Arias, op. cit., p. 58. It has been claimed that the Panama route was finally selected after its partisans had convinced the U. S. Senate that the Nicaragua route suffered frequent earthquakes and shocks along the proposed site. The relative size of the Isthmus, however, and the stage of involvement with Colombia appear to have been the major reasons for the final decision; see Miner, op. cit., pp. 147-156; see also Hammond and Lewin, loc. cit.

[32]See n. 13 above.

[33]John Bassett Moore, A Digest of International Law, Vol. III, (Washington, D. C., 1906), p. 35. (Italics mine.) Hereinafter cited as Moore, Digest, III.

[34]Annual Message of President Pierce, Dec. 2, 1856, Messages and Papers, VI, p. 2949.

[35]Secretary of State Seward to Mr. Burton, Minister to Colombia, Oct. 9, 1866, Foreign Relations of the United States, 1866, Vol. III, (Washington, D. C., 1867), p. 5841. The situation on the Isthmus during this time (1865-1866), as described by the diplomatic correspondence between the U. S. State Department and the American legations in Colombia, was one of virtual anarchy. Governments were changing hands in Colombia to such an extent that it was often difficult to know which group was actually in power. While one government requested United States assistance to quell an invasion of Panama by another state of Colombia in July of 1865 (see p. 464), a new government three months later alleged the violation of Colombian sovereignty when United States forces disembarked and conducted military exercises along the transit route (see p. 459). One month before, on September 6, 1865, the president of the "Sovereign State of Panama" also protested the American presence and warned that such military exercises must not take place without that government's permission (see p. 460). Under these conditions, it would have been difficult to determine whether the United States was actually "intervening." In some instances the Colombian Government insisted on the United States' duty under Article XXXV to come to its aid in putting down insurrections, though the State Department hesitated in doing so. The alleged violations of Colombian sovereignty came as a result of the constant presence of American troops in the port cities, causing frequent clashes with local citizens and police. The State Department justified this presence on the necessity of maintaining the transit route open and protecting American lives and property. American landings for this purpose took place on repeated occasions, and the correspondence shows a careful

awareness on the part of the State Department not to become involved in any internal matters (see pp. 451-585). The period between August 1865 and November 1866 was apparently the one in which the turmoil in Colombia was at its peak; see also Messages and Papers, XIV, p. 6811.

[36]Mr. de Sabla to Mr. Marcy, Oct. 2, 1856, Senate Document No. 143, 58th Congress, 2d Session, pp. 4-5; also Messages and Papers, XIV, p. 6811.

[37]Ibid.

[38]Message of Francis B. Loomis, Acting Secretary of State to President Roosevelt, Jan. 30, 1904, Senate Document No. 143, pp. 2-3.

[39]For the descriptions of the more than twenty insurrections and riots on the Isthmus during that time, see Messages and Papers, XIV, pp. 6811-6812, and Senate Document No. 143, p. 77.

[40]See Moore, Digest, III, pp. 35-43; and Senate Document No. 143.

[41]Senate Document No. 143, pp. 202, 203, 229, 230, 286.

[42]Ibid., pp. 289-292, 71-76.

[43]Telegram from Mr. Hay to Mr. Hart, Oct. 16, 1902, Ibid., p. 76.

[44]Valdés, op. cit., pp. 4-5.

[45]Harding, op. cit., pp. 31-32; McCain, op. cit., p. 13.

[46]Historia Documental, pp. 157-178.

[47]Howard C. Hill, Roosevelt and the Caribbean (New York, 1965), p. 50.

[48]Senate Document No. 474, cited by Hill, op. cit., p. 45.

[49]Henry F. Pringle, Theodore Roosevelt: A Biography (New York, 1931), p. 219.

[50]Alfred L. P. Dennis, Adventures in American Diplomacy (New York, 1928), p. 318.

[51]Ibid., p. 320.

[52]Ibid., pp. 326-327.

[53]Roosevelt to Hay, Aug. 19, 1903, E. E. Morison (ed.), The Letters of Theodore Roosevelt (Mass., 1951), pp. 566-567.

[54]Hay to Roosevelt, Aug. 22, 1903, from the Hay Papers in the possession of Mrs. J. W. Wadsworth, cited in Dennis, op. cit., p. 320.

[55]Dennis, op. cit., p. 320.

[56]Roosevelt to Hanna, Oct. 5, 1903, Morison, op. cit., p. 625. (Italics mine.)

[57]Harding, op. cit., p. 30.

[58]Theodore Roosevelt, An Autobiography (New York, 1920), p. 522.

[59]Messages and Papers, XIV, pp. 6835-6836.

[60]Telegrams sent by Navy Department to commanders of respective vessels, ibid., pp. 6764-6770.

[61]Ibid., pp. 6832-6836.

[62]McCain, op. cit., pp. 13-14; Domingo H. Turner, Tratado Fatal (Mexico, 1964), p. 43; Thelma King H., El Problema de la Soberania en las Relaciones entre Panama y los Estados Unidos de America (Panama, 1961), p. 30.

[63]Harding, op. cit., p. 33.

[64]Mr. Darling to Nashville, Nov. 2, 1903, Messages and Papers,XIV, pp. 6765-6766.

[65]Mr. Malmros to Mr. Hay, Nov. 3, 1903, loc. cit., p. 6753.

[66]General Esteban Huertas, commander of the local Colombian army on the Isthmus, is said to have accepted a huge bribe for which he later arrested the remaining Colombian officers who refused to cooperate (see content of telegram in No. 69 below). In Colon, Colonel Torres apparently accepted a bribe of $8000 from the Panamanian revolutionaries and turned his troops back to Cartagena; Dennis, op. cit., p. 331.

[67]Mr. Darling to Nashville, Nov. 3, 1903, loc. cit., p. 6766. (Italics mine.)

[68]Mr. Moody to Boston, Nov. 5, 1903, loc. cit., p. 6767.

[69]Commander Hubbard to Mr. Moody, Nov. 4, 1903, loc. cit., p. 6769. (Italics mine.)

[70]Mr. Ehrman to Mr. Hay, Nov. 4, 1903, loc. cit., p. 6749.

[71]Harding, op. cit., pp. 35, 37.

[72]Pringle, op. cit., p. 231.

[73]Mr. Hay to Mr. Ehrman, Nov. 6, 1903, loc. cit., p. 6750. (Italics mine.)

[74]Mr. Hay to Mr. Beupré, and Doctor Herran, Nov. 6, 1903, loc. cit., p. 6761.

[75]The Moore Memorandum has not appeared previously in any published work, and was obtained from Mr. Moore by Dwight Miner; see Appendix D in Miner, op. cit., pp. 427-432.

[76]Miller, op. cit., p. 213.

[77]Roosevelt's Annual Message to Congress, Dec. 7, 1903, Messages and Papers, XIV, p. 6810.

[78]Ibid.

[79]Hans Kelsen, Principles of International Law, 2d. ed., edited by Robert W. Tucker (New York, 1966), p. 179; pacta sunt servanda: "treaties must be observed." See McNair, op. cit., p. 493; Schwarzenberger considers the principle of good faith as one of the seven fundamental principles of international Law, the other six being sovereignty, recognition, consent, freedom of the seas, international responsibility, and self-defense. In this regard he states: "Parties to consensual engagements must interpret and execute such engagements in good faith." Georg Schwarzenberger, A Manual of International Law, 5th ed. (New York, 1967), pp. 44, 148.

[80]Grotius, De Jure Belli ac Pacis, Bk. II, ch. XXV. 8, cited in Ian Brownlie, International Law and the Use of Force by States (Oxford, 1963), p. 338.

[81]Ellery C. Stowell, Intervention in International Law (Washington, D. C., 1921), p. 53.

[82]Ibid., pp. 52-55, and Brownlie, op. cit., p. 338; see also Ann Van Wynen Thomas and A. J. Thomas, Non-Intervention (Dallas, 1956), p. 29.

[83]The intervention of England, France, and Russia in the aid of Greek insurgents in 1927, President Van Buren's intervention with the Sultan of Turkey in 1840 on behalf of persecuted Jews in Damascus and Rhodes, and the French intervention to check religious atrocities in Lebanon in 1861, have been advanced as examples of humanitarian intervention. Thomas and Thomas, op. cit., p. 373; see also Stowell, op. cit., pp. 126, 489.

[84]Brownlie, op. cit., p. 389; see also Essays on Intervention, edited by Roland J. Stanger (Ohio, 1964), and L. Oppenheim, International Law, Vol. I, (London, 1905), p. 186.

[85]Roosevelt's Special Message to Congress, Jan. 4, 1904, Messages and Papers, XIV, p. 6831. There is no indication that Roosevelt consulted with any other eminent international lawyer aside from John Bassett Moore.

[86]Note of Secretary Hay to General Reyes, Jan. 5, 1904, Foreign Relations of the United States, 1903, pp. 294-306. (Italics mine.)

[87]Historia Documental, p. 37. (Italics and translation mine); see also Moore, Digest, III, p. 5.

[88]McNair, op. cit., pp. 380-381.

[89]Hans Blix, Treaty-Making Power (London, 1960), pp. 384-385; see also McNair, Ibid., p. 553.

[90]McNair, op. cit., pp. 458-462.

[91]The "license" referred to by Moore was in the nature of an "implied permission" granted to the United States by virtue of Article XXXV. Dennis, op. cit., p. 327.

[92]Roosevelt's Message to Congress, Dec. 7, 1903, Messages and Papers, XIV, p. 6814.

[93]See n. 56 above. It is interesting to view Roosevelt's argument in the light of some of the nineteenth century attitudes regarding the role of ethics and morality in the practice of international law. In 1895, for example, T. J. Lawrence maintained that ethical considerations could not be excluded from international law, and that one could not speak only of "international law," but of "international morality" also, though there was no attempt at actually defining the sphere of international morality or of actions justifiable on such grounds. T. J. Lawrence, The Principles of International Law (Boston, 1895), pp. 16, 145, 155. Oppenheim in 1905 stated that ". . . without some kind both of morality and law, no community has ever existed or could possibly exist." His concept of law, therefore, is one closely entwined with considerations of morality. Oppenheim, International Law, Vol. I, p. 12.

Nevertheless, and even though the sphere of morality remains a difficult one to define, one would be hard-pressed to find any considerations of morality surrounding the Panama situation as it presented itself to Roosevelt. Rather, such a claim would appear to be a convenient disguise for more selfish motives.

[94]Early non-American writers, such as Westlake and Oppenheim, held interesting views on the question of intervention. Westlake in 1904 justified intervention only on two grounds, one being "when the object is to put down a government which attacks the peace, external or internal, of foreign countries . . . ," the other being when ". . . a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbors . . . ." John Westlake, International Law, Part I (Cambridge, 1904), p. 305; Oppenheim in 1905 justified intervention for purposes of self-preservation, for the maintenance of the balance of power, and in the interest of humanity. With regard to the latter, however, such could be excused only if the intervention occurred for ". . . stopping religious persecutions and endless cruelties," and if it was exercised in the form of a collective intervention. Oppenheim, International Law, Vol. I, pp. 186-187.

[95]Roosevelt's Special Message to Congress, Jan. 4, 1904, Messages and Papers, XIV, p. 6827.

[96]Note of General Reyes to Secretary Hay, Dec. 23, 1903, Foreign Relations, 1903, pp. 284-294.

[97]"This convention having been signed by the contracting parties shall be ratified according to the laws of the respective countries, and exchanged in Washington at the end of eight months as of this date, or before if such is possible." Article XXXVII, Hay-Herran Treaty, Historia Documental, p. 178. (Translation mine.)

[98]McNair, op. cit., p. 135; Mervyn Jones, Full Powers and Ratification (Cambridge, 1949), pp. 132, 77-79; Ingrid Detter, "Ways to Express Consent to Treaties," Essays on the Law of Treaties (London, 1967), p. 19; Arias, op. cit., p. 61; it should be noted that Colombia informed the American Government of its decision not to ratify the Hay-Herran Treaty within the eight month period stipulated in Article XXXVII. See Historia Documental, p. 178; while the modern practice has seen a relaxing of the rules of ratification (see Kaye Holloway, Modern Trends in Treaty Law (London, 1967), pp. 73-77), the opinion of early writers on that matter seemed to maintain the necessity of ratification and the freedom of withholding the same. William Hall in 1904 held that ". . . tacit or express ratification by the supreme treaty-making power of the state is necessary to . . . [the treaty's] validity . . . . The necessity of ratification by the state may then be taken as practically undisputed." Hall also maintained that "ratification may be withheld; and perhaps in strict law it is always open to a state to refuse it." William E. Hall, A Treatise on International Law, 5th ed. edited by J. B. Atlay (Oxford, 1904), pp. 330-332. John Westlake stated in 1904 that "such an act always requires ratification by the contracting

authorities of the parties, whether . . . that necessity is expressly reserved in the treaty or not." He maintained also that "Ratification may be refused by any party, and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it. Westlake, op. cit., pp. 279-280. Wheaton, as early as 1863, maintained the necessity of ratification in order to give validity to the acts of a minister, and the right of the sovereign to delay or refuse ratification, ". . . the peculiar circumstances of each particular case . . . [determining] whether the rule or the exception ought to be applied." H. Wheaton, Elements of International Law, 2nd ed., edited by W. B. Lawrence (Boston, 1863), p. 445. Wharton's Digest of 1866 provides numerous extracts from statements by presidents and secretaries of state which vary considerably regarding the necessity of ratification. There appears to be little disagreement, however, in the case of treaties expressly stipulating the requirement of ratification. Francis Wharton, A Digest of International Law of the United States, Vol. II, (Washington, D. C., 1886), pp. 5-27.

[99]See n. 68 above; see also Harding, op. cit., p. 34.

[100]Mr. Beupré to Mr. Hay, Nov. 7, 1903, and Mr. Hay to Mr. Beupré, Nov. 11, 1903, Messages and Papers, XIV, pp. 6760-6761.

[101]Doctor Herran to Mr. Hay, Nov. 6, 1903, and Mr. Hay to Doctor Herran, Nov. 11, 1903, loc. cit., p. 6762.

[102]Mr. Reyes to Mr. Hay, Dec. 8, 1903, and Mr. Hay to Mr. Reyes, Dec. 11, 1903, loc. cit., pp. 6853-6854. (Italics mine.)

[103]Convenio Thomson-Urrutia, April 6, 1914, Historia Documental, pp. 350-355.

[104]Messrs. Arango, Boyd, and Arias to Mr. Hay, Nov. 4, 1903, Messages and Papers, XIV, p. 6756.

[105]Those material conditions laid down by Oppenheim (Int. Law, Vol. I, p. 114) and discussed by Chen are (a) a people, (b) a country, (c) a government, and (d) a sovereign government. Ti-Chiang Chen, The International Law of Recognition, edited by L. C. Green (London, 1951), pp. 54-55.

[106]H. Lauterpacht, Recognition in International Law (Cambridge, 1947), p. 8.

[107]Oppenheim states: "An untimely and precipitate recognition of a new state is a violation of the dignity of the mother state, to which the latter need not patiently submit." Oppenheim, International Law, Vol. I, p. 111; see the Advisory Opinion on the Settlers of German Origin in Territory Ceded by

Germany to Poland (1923), P.C.I.J., Series B. No. 6, Manley O. Hudson, World Court Reports, Vol. I, 1922-1926 (Washington, 1934), pp. 207-287.

[108]Lauterpacht, op. cit., p. 28.

[109]Chen, op. cit., p. 54; Lauterpacht and Goebel consider the recognition of Panama as premature. Other acts advanced as examples of premature recognition are the recognition of the insurgent government of General Franco by Germany and Italy in 1936, the recognition by Soviet Russia of the government of Finland in 1939 following the invasion of that territory by Russia, and the recognition of the United States by France. Lauterpacht, op. cit., pp. 94, 95f., and Julius Goebel, The Recognition Policy of the United States (Published thesis, New York, 1915), pp. 72-93, 213-217; see also B. R. Bot, Non-Recognition and Treaty Relations (New York, 1968), p. 22; Schwarzenberger, Manual, p. 70; Charles G. Fenwick, International Law, 3rd ed. (New York, 1948), p. 142.

[110]Lauterpacht, op. cit., p. 8; Chen, op. cit., pp. 54, 85; Oppenheim, International Law, Vol. I, p. 111.

[111]Lauterpacht, op. cit., p. 10.

[112]Theodore S. Woolsey, "The Recognition of Panama and its Results," 3 Canadian Law Review, 1904, pp. 100-101.

[113]Lauterpacht, op. cit., p. 8.

[114]Chen, op. cit., p. 85. (Italics mine); see Goebel, op. cit., p. 217; Thomas and Thomas, op. cit., p. 29.

[115]Early writers, for the most part, also held this view. See for example Hall, op. cit., p. 83; Westlake, op. cit., pp. 51-58; Wharton, Digest, II, p. 48.

[116]Miller, op. cit., appearing as motto at head of text. It would perhaps be interesting to evaluate these events and the developments to follow in view of the United Nations General Assembly Resolution of December 21, 1952, affirming the right of peoples freely to use and exploit their natural wealth and resources. See General Assembly Resolution 626 (VII), Yearbook of the United Nations, 1952, p. 390.

PART II

CHAPTER I

THE TREATY OF 1903: THE ALLEGED GROUNDS FOR INVALIDITY

On November 18, 1903, the "Treaty Between the United States and Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans" was signed at Washington by Secretary of State John Hay and the Minister appointed by Panama, Philippe Bunau-Varilla, ratifications being exchanged at that city on February 26, 1904.[1] The Hay-Varilla Treaty, as it has since been termed, presently governs the relations between Panama and the United States. Except for slight modifications by way of additional treaties and protocols in 1904, 1936, 1942, and 1955, the basic content of the Treaty has remained unchanged. A number of Panama's grievances were recognized as a result of these, but the fundamental issues that created storms of protest and cries of indignation on the part of Panama within a year of its proclamation have to this day remained unsettled.

It will be the purpose of this chapter to evaluate those basic grounds advanced by Panama throughout the years and maintained today regarding the validity of the Hay-Varilla Treaty. It is necessary first, however, to examine the contents of that document.

According to Article I, "The United States guarantees and will maintain the independence of the Republic of Panama." By Article II, Panama granted to the United States "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection" of the Canal five miles on each side of the center line of the canal route and across the Isthmus from the Caribbean Sea to the Pacific Ocean including the distance of three marine miles from the mean low water mark on both sides and excluding the harbors and cities of Colon and Panama which otherwise would fall within the boundaries described above. By the same article Panama also granted, in perpetuity, "the use, occupation and control of any other lands and waters outside of the zone . . . described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection" of the Canal or any other works necessary for carrying out that enterprise. Four islands in the Bay of Panama were also granted in perpetuity.

Article III "transferred" the Canal Zone to the United States in the following manner:

> The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

Subsequent articles also granted to the United States

in perpetuity the bodies of water necessary for carrying out the stipulations mentioned above; the monopoly for the construction and operation of any system of communication by means of canal or railroad across Panamanian territory; the right to acquire by eminent domain the necessary properties within the limits of Panama and Colon and their adjacent harbors; and the right and authority to maintain public order in Panama and Colon ". . . in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order."

Panama also agreed not to impose custom duties or other charges on vessels, cargo or passengers passing through the Canal or touching the ports of Panama and Colon; not to impose taxes on the equipment, property or personnel in the service of the Canal or auxiliary works; and to allow the United States to employ armed forces or establish fortifications of any kind in the Canal Zone for the protection of the Canal.[2]

These provisions constituted the bulk of the concessions made by Panama to the United States at that time. In exchange for these, the United States agreed to pay Panama $10,000,000 in gold coin and an annual payment of $250,000 in gold coin beginning nine years after the exchange of ratifications. The Government of Panama was also granted the right to transport over the Canal its vessels and troops free of charge.[3]

Within a few months after the conclusion of the Treaty, the Panamanian Government began to raise strong objections

regarding what it considered an excessive encroachment of its sovereignty by the United States. The former contended that only so much of its sovereignty had been relinquished as was necessary for the "construction, maintenance, operation, sanitation, and protection" of the Canal. As a result of an "abusive presence" of Americans throughout the Isthmus and in indignation of the armed occupations of various towns and cities in 1918, 1921, and 1925,[4] Panama insisted on a treaty revision. An agreement concluded in 1926 with the apparent intention of ameliorating the situation was considered unsatisfactory by the Panamanian Senate and summarily rejected.[5]

With the advent of the "New Deal" and the end of the Depression in the early 1930's, Panama pinned its hopes on President Franklin D. Roosevelt. In accordance with his "good neighbor policy," the differences between the two governments were thoroughly and frankly debated in an effort to arrive at an understanding.[6] After two years of negotiations the General Treaty of Friendship and Cooperation was concluded in 1936.[7]

By its terms, Article I of the Hay-Varilla Treaty guaranteeing the independence of Panama was eliminated and substituted by a pledge of peace and friendship between both nations. Article II of the new treaty abrogated the right of the United States to expropriate lands outside of the Canal Zone. In the event that such land was necessary for the Canal, the two countries were to take "joint action" after mutual consultation. By Article VI the right of the United States to intervene in the cities of Panama and Colon for the preser-

vation of order was also eliminated. In addition, some of Panama's fiscal rights over the Canal Zone were recognized with the former's right to collect tolls from merchant ships in the ports of Panama and Colon and to control immigration through the ports of the Canal. The Canal Zone was also closed to the commerce of the world so as not to be in competition with the commerce of Panama. A corridor through the Canal Zone was established so as to join the two sections of the Republic separated by the Zone. In addition, the annuity payment of $250,000 was raised to $430,000.[8]

The new treaty was hailed in Panama as a substantial improvement over the precarious grants made in the Treaty of 1903. In particular, the permanent threat of having the entire Republic occupied by the United States, should that have been deemed "necessary," was eliminated, prompting one commentator to consider the occasion as a "genuine reason to allow the Isthmian people to breathe once more."[9]

Following what Ricardo J. Alfaro considered a "manifestly satisfactory" treaty[10] which put an end to Panama's status as a virtual protectorate of the United States, and in the grip of the War Years, a period of genuine cordiality existed between the two nations for the next decade. By 1950, however, demands for another treaty revision again were pressed by Panama. Hopes were centered on the new president, Remon Cantera, who had promised Panamanians he would seek to correct once and for all the injustices created by the Treaty of 1903.[11] The initiative was accepted by the United States and

after two years of negotiations, the Remon-Eisenhower Treaty was concluded in 1955, shortly after the assassination of President Remon.[12] Insisting on his motto, "neither millions nor charity; we want justice," Remon had approached Eisenhower with an extensive list of Panamanian demands, most of them involving the question of sovereignty in the Canal Zone. Eisenhower refused to consider those measures that limited the interpretation of the "sovereignty clause" in Article III.[13] The result was an agreement[14] improving slightly on the 1936 revision, the only substantial Panamanian gain being a further increase in the annuity payment, which now was set at $1,930,000. Other gains included an additional corridor through the Canal Zone; the abrogation of the United States' monopoly over trans-Isthmian communication; the end of any further sanitation assistance by the United States; the restriction of Panamanian purchases in Canal Zone commissaries; and the transfer to Panama of certain lands and properties <u>outside</u> of the Canal Zone which had been previously expropriated by the United States. In exchange, Panama granted to the United States the use, for military purposes, of an area of land known as Rio Hato for a period of fifteen years.[15] In an accompanying "Memorandum of Understanding," agreements were reached on the problem of equal pay for Panamanians working in the Canal Zone and on taxation by Panama of non-United States citizens working in the Zone.[16]

By the terms of this treaty, then, the remaining vestiges of authority the United States maintained <u>outside</u> of the allotted Canal Zone were finally surrendered, and Panama was

allowed a measure of fiscal control over its affairs extending into the Canal Zone. The Treaty was also met in Panama with a relative degree of satisfaction since, as far as any American encroachment was concerned, its affairs no longer extended outside of the boundaries of the Canal Zone.

In the United States, the Treaty of 1955 was seen as a precarious weakening of that nation's hold on an unstable and not very dependable Isthmus. Charles Fenwick maintained that the Treaty was exceedingly generous, giving to that "strategically important nation" more than the United States received.[17] The Panamanian attitude, however, was restrained since, as one commentator pointed out, the United States gave back only what it had taken from Panama in 1903--and then only part of it.[18]

Panama was now, for the first time in its history, the de facto sovereign of its territory excluding the Canal Zone. It was not long after, however, that the attention in Panama was directed at the alleged "illegality" of the American presence on the Isthmus. It was being claimed now that the Panama Canal was Panama's only natural resource--the cause of its very existence--and that the occupation of that waterway and its environs by a foreign nation which denied Panama any participation, benefit, or sovereignty over it, was a genuine cause for indignation.[19] The thought of an American "colony" existing permanently within the borders of the Isthmus, the unequal treatment of Panamanian workers in the Canal Zone, the relatively minute annuity received by Panama as compensa-

tion, and the existence of the American Army's vast arsenals extending from coast to coast was, by the end of the 1950's, becoming a source of increasing resentment.[20]

In sum, the existence of an alien community across the center of the Isthmus that had exercised control over Panama's greatest natural resource to the entire exclusion of Panama for some sixty years, and that promised to continue doing so "in perpetuity," seemed to Panama an unjust and outmoded arrangement. The United States, in turn, consistently argued that Article III of the Hay-Varilla Treaty, with its sweeping grants of rights, powers, and authority to be exercised as if it were the sovereign in the area, placed no limitations on that nation's actions, particularly in view of the fact that these are justified as being necessary to the operation, defense, and maintenance of the waterway.[21] Against such an argument, Panama has had little success.

Shortly after the conclusion of the Treaty of 1955 and following in the wake of the murder of President Remon, demands against the United States increased in frequency and intensity. The failure of the United States in responding to the unrest and in acceding to Panama's wishes for a revision of the Treaty allowed the matter to assume critical proportions. In November of 1959 a group of Panamanian students led by ardent nationalists entered the Canal Zone carrying small Panamanian flags which they intended to plant in that area as a symbol of Panama's sovereignty over the Canal Zone. As a result, violent clashes broke out between the students and Canal Zone Police.

In a belated response to the agitation, President Eisenhower, in September of 1960, took the "voluntary and unilateral decision" to fly the Panamanian flag together with the American flag at a square on the Canal Zone side of the border, an attempt at appeasement which only served to heighten Panamanian resentment.[22]

In January of 1963, Presidents Kennedy and Chiari reached an agreement whereby both flags were to be flown on land in the Canal Zone wherever the United States flag was flown by civilian authorities. The delay on the part of Canal Zone authorities in implementing the agreement and the refusal of American students at Balboa High School to comply, by preventing Panamanian students from hoisting their own flag beside the American one, precipitated a scuffle between the two groups on January 9, 1964, which eventually resulted in a series of violent disturbances along the fifty mile border. The United States Army was called out and stationed with Canal Zone Police along the border in order to prevent the enraged Panamanian mob from entering the Canal Zone. After three days of rioting along the border, some twenty-seven persons had been killed and over four-hundred wounded.[23] The Government of Panama immediately severed diplomatic relations with the United States, and some weeks later charged that nation before the Council of the Organization of American States with acts of aggression against the Panamanian people. A subcommittee of that organization sent to Panama the next month to investigate the charge concluded that the United States had not been

guilty of deliberate armed aggression, since their use of force was necessary to protect the lives and property of American citizens residing in the Canal Zone.[24] A similar charge laid before the International Commission of Jurists also prompted the Investigating Committee of that organization to conclude, that the use of force by the United States was necessary in order to prevent the violence from entering the Canal Zone. Nevertheles, the Commission noted in its conclusion that the United States,

> . . . having regard to the special situation it occupies in the world, and with its resources and ideals, should reflect upon these sad facts and take effective steps to make possible a reorientation and change in the outlook and thinking of the people living in the Canal Zone.[25]

On April 3, 1964, the two countries reached an agreement for the resumption of diplomatic relations and for the holding of further conferences in order to ameliorate their differences.[26]

As a result of subsequent negotiations, three draft treaties were prepared in 1967 which would abrogate the previous 1903, 1936, and 1955 agreements, and establish a joint administration for the Panama Canal.[27] Both governments, however, have failed to consider the draft treaties, and public opinion in Panama has favored their prompt repudiation, the Panama Bar Association labelling them a "grave risk" for Panama.[28] The contention was advanced that the Hay-Varilla Treaty was, for over sixty years, such a formidable detriment to Panama that any new agreement must constitute a clear and

thorough departure from that instrument, eliminating once and for all "those situations which are the source of conflict between the two countries."[29]

The Panamanian attitude is understandable. Panama wants an effective and substantial agreement recognizing most, if not all, of its claims over the Canal Zone and the Panama Canal, without granting the United States any sovereign attributes or allowing the perpetuation of "the colonialism existing in the Canal Zone."[30] So intense has been the experience of Panama with the United States, that in considering a new treaty it will inevitably adopt a hard line toward any negotiations. As former Ambassador to Panama, Joseph Farland, points out, "this issue of sovereignty in perpetuity is one that is ingrained in the heart of every Panamanian, be he one year old or one-hundred."[31] The United States, on the other hand, realizing the strategic and commercial importance of the Canal,[32] and in possession of the necessary grants under the Hay-Varilla Treaty, cannot be expected to surrender such a grasp to a perpetually unstable nation, regardless of political niceties. In view of such a stalemate, it appears unprobable that the two countries will arrive at any workable compromise--at least not within the next few years.

As a result, the Treaty of 1903 with its subsequent modifications continues to define the relations between the two States, and must necessarily constitute the starting point from which any future negotiations will evolve.

It would be appropriate, then, at this point, to con-

sider those claims which Panama has advanced throughout the last decade with regard to the alleged invalidity of the 1903 Treaty, and the disputes which have arisen concerning the interpretation of that agreement.

Prominent commentators and writers have claimed the Treaty of 1903 to be invalid for any one of the following reasons:

1. The circumstances under which the Treaty was concluded.
2. Contradictions within the Treaty itself and its incompatibility with the Constitution of the Republic of Panama.
3. The illegality of the "perpetuity clause."
4. Application of the principle of the clausula rebus sic stantibus.
5. The use of the Canal Zone for purposes other than for the maintenance, operation, sanitation, and protection of the Canal.
6. The inequality and unfairness of the Treaty.[33]

Let us consider each of these briefly.

The circumstances under which the Treaty was concluded

It appears that while Philippe Bunau-Varilla was in Washington after having been appointed by the provisional government in Panama to negotiate the Treaty with Secretary Hay, he received word that the two other negotiators, Amador and Boyd, were on their way to Washington to supervise the

talks. Fearing that the two envoys might delay the conclusion of the Treaty and deny him the satisfaction of concluding it himself, Varilla rushed to Hay, and between the two men the Treaty was drawn up and signed within five days. It is still not clear which of the two men did in fact write the Treaty, but it appeared that in his enthusiasm and haste, Varilla made no demands of Hay. In fact, it has been maintained that he purposely drew up parts of the Treaty in order to please Hay and conclude the document as rapidly as possible before Amador and Boyd arrived.[34] Hay was apparently elated at Varilla's conciliatory disposition, and realizing the favorable contents of the document before him, lost no time in affixing his signature to it.[35] As McCain states,

> The Panamanians were not long in finding that John Hay and Philippe Bunau-Varilla had foisted upon them an exceedingly unsatisfactory treaty. They were the victims of a pact negotiated and signed . . . by an American who knew little of their interests and needs and by a Frenchman who probably cared less.[36]

When Varilla met Amador and Boyd on their arrival at Washington, he informed them that the Treaty had been signed that same morning (November 18). The negotiators were stunned, but realizing it was too late to press the matter, acceded to the unfortunate turn of events.[37] The Treaty was immediately sent to Panama and ratified on December 2, 1903 by the provisional government of that country.[38] It was not until January of 1904 that Panama adopted a constitution, and the Treaty, therefore, was never considered by the National Assembly of that country.[39] This fact, together with allegations regard-

ing Varilla's capacity to conclude the Treaty, and charges of duress and intimidation allegedly exercised on Panama by the State Department, have been frequently levelled against the validity of the document.[40]

Regarding Varilla's accreditation, a telegram sent to Hay by the provisional government on November 6, 1903, three days after the revolution, read:

> The board of provisional government of the Republic of Panama has appointed Señor Philippe Bunau-Varilla envoy extraordinary and minister plenipotentiary near your government with full powers to conduct diplomatic and financial negotiations. Deign to receive and heed him.[41]

The subsequent ratification of the Treaty by the provisional government of Panama <u>two weeks</u> after its conclusion,[42] leaves little doubt as to Varilla's competence and accreditation. The provisional government apparently found no cause to dispute his actions, since it ratified the agreement within days after its submission in Panama, while the United States did not ratify the agreement until February 23, 1904, more than <u>three months</u> after its conclusion.[43]

As to the charges of duress and intimidation, none appears to have been exercised in any way by the State Department, nor was there any cause to. Panama appeared to want the canal enterprise across its territory as much as the United States did, and seemed not to want to lose any time in getting started. Varilla's impetuosity and the haste of the provisional government in ratifying the Treaty did not give Roosevelt the opportunity to apply any pressure on Panama. There can be little doubt that having come this far, Roosevelt

would not have allowed anything to stand in his way, but Panama's enthusiasm seemed to be more intense than either Roosevelt or Hay expected, and the need for any intimidation did not arise.[44]

Contradictions within the Treaty itself and its incompatibility with the Constitution of the Republic of Panama

Consentini alleges that while Article I of the Treaty of 1903 guaranteed the independence of Panama, Article III granted certain sovereign attributes to the United States, thereby "annulling that independence."[45]

To begin with the guarantee of independence was intended as a guarantee of Panama's "physical" independence from Colombia, an act which had been proclaimed only two weeks before the signing of the Treaty. Colombia had been making efforts at that time to regain its lost territory, and continued doing so for a length of time after the Treaty had been concluded.[46] In fact, Colombia did not formally recognize Panama until 1914.[47]

Moreover, the guarantee in Article I, no longer being necessary, was abrogated by the Treaty of 1936, as were those sovereign attributes granted to the United States outside of the Canal Zone.[48]

The constitution presently operative in the Republic of Panama is that document adopted in 1946, the third constitution adopted by that country. (The previous constitutions were those of 1904 and 1941.)[49] According to Article 231 of the 1946 Constitution, "No foreign government nor any foreign

official or semi-official entity or institution may acquire dominion over any part of the national territory."[50] According to Article 3, however, "The jurisdictional limitations stipulated in public treaties made previous to the Constitution are recognized."[51] It is the term "jurisdictional limitations" that has provoked the charge of inconstitutionality against the Treaty of 1903. It is argued that the recognition of "jurisdictional limitations" is another matter altogether from the recognition of "sovereignty" which Panama, in effect, has allowed the United States to exercise in the Canal Zone.[52]

The matter of constitutional limitations in treaty-making, and the controversy as to the superiority of international law over municipal law are questions of a highly debatable nature, but to impute a charge of inconstitutionality based on the difference between the terms "jurisdictional limitations" and "sovereignty" is to advance an argument lacking any measure of substance.

It is only necessary to point out that Article III of the 1903 Treaty states that the United States was to be granted all the rights, power, and authority within the Canal Zone which it would possess "<u>if it were the sovereign</u>",[59] thereby denying that the United States is in fact <u>the</u> sovereign. Moreover, the present Constitution of Panama as well as the Constitution of 1904 were adopted <u>after</u> the conclusion and ratification by Panama of the Treaty of 1903.

Nevertheless, it is interesting to note Kaye Holloway's conclusion on the question of constitutional limitations:

> There is a general rule of international law which decrees that a state must not only fulfil its obligations under international law, but it remains responsible for any breach of rules, whether customary or conventional and whatever the source of violation. . . . It is immaterial to international law what procedure a state establishes in order to ensure the operation of its rules in the domestic legal order. Once it is established that a state cannot plead its municipal law or a provision of its constitution to contract out of a binding rule of international law or an agreement, it stands to reason that it becomes necessary for a state to adapt its internal law to its obligations under international law. In other words, a state must ensure the operation of international law in the domestic legal order, where this is a condition of the fulfilment of its obligations under international law.
>
> . . . . A treaty becomes binding upon exchange of ratifications, a purely executive act on the international plane, albeit implying in certain cases legislative authorization in domestic law. Consequently, no government can rely on the subsequent obstruction or opposition of other organs to withdraw from the treaty obligations validly contracted on the international plane. Whatever its effect on domestic law, the state continues to be bound under international law. . . . [therefore,] a subsequent legislation cannot liberate the state from its obligations under a prior agreement.[54]

The illegality of the "perpetuity clause"

The claim against the validity of the "perpetuity clause"[55] is closely connected with the Panamanian view of the principle known as clausula rebus sic stantibus[56] and its application to the Treaty of 1903, a matter that is dealt with shortly; however, it is in its isolated sense that the charge has most frequently been levelled.

A number of prominent figures in Panama[57] have spoken out against the "perpetuity clause," considering it as the basis of conflict between the two nations. George Westerman, former Panamanian delegate to the United Nations, considered this matter ". . . the principal complaint of the Panamanian

people against the United States."[58]

The reason is, of course, not difficult to appreciate. Saddled with what Panamanians regard as an unjust treaty, the "perpetuity clause" would permit the United States to maintain the status quo in the Canal Zone for all time, should they desire to do so, denying Panama any hopes whatever of a treaty revision. Aside from its frustrating character, some writers have claimed such an arrangement to be illegal in the light of international law.[59] Dr. Garcia Montufar, Dean of the Faculty of Law of the University of San Marcos in Peru, maintains that

> . . . [It is a] very curious matter, this lease in perpetuity; terms that contradict each other. I cannot conceive of a treaty by which one state grants to another the use of part of its territory for all time. . . . It is illegal, since all treaties of this nature contain a date of expiration, an essential condition for such treaties. Treaties without an expiration date are of undetermined duration; but the parties to the agreement enjoy the right of terminating it at any time with only previous notification. By no means do sovereign states conclude a treaty creating a lease in perpetuity.[60]

This statement, typical of many frequently echoed in Panama, is classic in its naivety. We will concern ourselves at this point, however, only with the alleged illegality of the perpetuity clause, since the question of the status of the Canal Zone is treated at length in Chapter II.

While most international agreements are concluded for a stipulated number of years, there exists no rule in international law whereby the conclusion of a treaty "in perpetuity" or "for all time" constitutes an illegal act insofar as the validity of the document is concerned. In such cases, the

treaty may be terminated either by another treaty concluded by the same contracting parties, thereby abrogating the previous one, or by mutual consent of the contracting parties.[61] The permanent character of the treaty does not in itself constitute a ground for invalidity. McNair, for example, maintains that:

> There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties. Some existing British treaties have endured for nearly six centuries, and many for three.[62]

As will be seen, treaties of indefinite duration have been subject to attempts at applying the clausula rebus sic stantibus in an effort by one party to denounce an agreement which, due to the passage of time or changes in circumstances, has become obsolete. The mere perpetual character of the treaty, however, cannot free a party from its obligations under that agreement.

Application of the principle of the clausula rebus sic stantibus

The claim has been put forward repeatedly by some Panamanians that the Hay-Varilla Treaty is void by application of the clausula rebus sic stantibus,[63] an often misunderstood and abused doctrine.

According to this principle, a treaty may become null and void in the event that there has been a fundamental change in the state of facts or in the circumstances which existed at the time the treaty was concluded, such that, if the change had been envisaged, provisions for abrogation or revision

would have been included in the agreement. It is often maintained, therefore, that treaties carry with them an implied term or clause--rebus sic stantibus--to the effect that the treaty obligations subsist only so long as the essential circumstances remain unchanged.[64]

The principle at first sight may seem to apply appropriately to the Hay-Varilla Treaty, since that agreement was concluded over sixty years ago by a state only two weeks into its independence. The clausula, however, remains today a much debated and enigmatic doctrine, on which juristic opinion is widely divergent.

Obviously, such a principle could easily lead to abuse in cases where the simple distastefulness of treaty obligations would prompt the dissatisfied party to invoke the clausula and denounce the agreement. Moreover, the problem immediately coming to mind is that of determining what in fact constitutes a "change in circumstances." While McNair treats the subject with a great deal of caution, pointing out that the British Governments have tended to hold strict views on the topic,[65] he considers two types of "changes" which might allow a contracting party to invoke the clausula. The first involves "changes of political power and influence," or changes in the balance of power and in the relative strength of the contracting parties, which, while not allowing a government to denounce a treaty ipso facto, may be regarded as a ground for re-examination of a treaty by all parties.[68] The second situation involves "changes affecting the specific

raison d'être of a treaty, such as a physical change, which would make performance of the treaty impossible, or changes which, though not purely physical, destroy "the very object of a treaty stipulation."[67] An example of a physical change would be the drying up of a river. In the case of the Hay-Varilla Treaty, an example of a change "destroying the very object of a treaty stipulation" might be the complete cessation of maritime commerce, thereby rendering the Canal useless.

Though McNair refers to the strict British view on the matter, the practice of other states has not been any less stringent, and the contribution made by international tribunals to the effect upon treaties of these "changes" does not amount to a great deal.[68] In the case of the Nationality Decrees in Tunis and Morocco in 1923, the Permanent Court of International Justice in its advisory opinion refused to consider the French contention that ". . . [those] treaties, . . . concluded for an indefinite period, . . . in perpetuity, have lapsed by virtue of the principle known as the clausula rebus sic stantibus because the establishment of a legal and judicial regime in conformity with French legislation has created a new situation which deprives the capitulatory regime of its raison d'être." The Court said simply that it could not make any pronouncement on the point "without recourse to the principles of international law concerning the duration of the validity of treaties, . . . [and that] the question does not, by international law, fall solely within the domestic jurisdiction of a state. . . ."[69]

In 1932 in the case of the Free Zones of Upper Savoy

and the District of Gex, France again invoked the clausula, and the Permanent Court held that the facts in that case did not justify the application of the doctrine as France had contended.[70] Nevertheless the Court did not expressly reject the doctrine; in fact, the judgment appeared to define, by implication, the scope of its application. Regarding that judgment, McNair concluded that

> . . . the inference that can reasonably be drawn from this case is that when a tribunal is invited to hold that a treaty is void and has lost its effect by reason of a change of the circumstances prevailing when it was concluded, a tribunal would not examine the legal validity of such an agreement unless if could be shown that the treaty was made in view of the existence of the circumstances alleged to have changed, so as to give their continuance the force of a condition precedent to the conclusion of the treaty.[71]

Also commenting on that judgment, J. L. Brierly maintained that

> The clausula is not a principle enabling the law to relieve from obligations merely because new and unforeseen circumstances have made them unexpectedly burdensome to the party bound, or because some consideration of equity suggests that it would be fair and reasonable to give such relief. . . . What puts an end to the treaty is the disappearance of the foundation upon which it rests.[72]

Hans Kelsen considers the doctrine in opposition to the rule of pacta sunt servanda. He claims that the clausula "is in opposition to one of the most important purposes of the international legal order, its purpose of stabilizing international relations."[73] While its merit lies in its dynamic character, its broad and facile nature renders it a highly precarious doctrine. As Schwarzenberger contends, "the clausula is open to abuse as a handy means of evading compliance

with burdensome obligations."[74]

Though there appears to be no recorded case in which its application has been admitted by both parties, or in which it has been applied by an international tribunal,[75] no such organ has tacitly rejected or denied the principle.[76] While the clausula is apparently recognized by international law, it is surrounded with restrictive conditions. Its potential for misuse appears to overshadow its merits. Tribunals have shied away from its consideration, and jurists, for the most part, have been wary of its implications.[77]

Insofar as Panama's efforts to invoke the clausula in support of its claims against the 1903 Treaty are concerned, it would appear that the argument is little more than an attempt by that country to free itself from an uncomfortable arrangement. Though more than sixty years have lapsed since the conclusion of the Hay-Varilla Treaty, and the simple passage of time has brought with it the natural changes in the development of both countries, basic "circumstances" have changed little--if any. There has been no substantial change in the power relationship of the two nations nor in their physical make-up which may have rendered compliance either oppressive or impossible; neither has there been any change whatever in the specific raison d'être of the Treaty. The latter was concluded for the specific purpose of constructing, operating, maintaining, and protecting the Panama Canal, and neither these purposes nor their surrounding circumstances have changed to any appreciable degree throughout the last

sixty years. The Canal is today still a vital international waterway, carrying about one-twentieth of the world's sea-borne commerce and with steadily increasing traffic. It is undoubtedly "of enormous significance to United States commerce," the largest users of the Canal,[78] and is in no way obsolete insofar as international shipping is concerned.

The most that can be said is that the Treaty, after more than half a century, has created an embarrassing modus vivendi for Panama, allowing the "colossus of the North" to operate an international waterway and establish a community within the Republic's national territory over which it has no control and from which it receives little benefit. The arrangement, however, has produced no grounds which can properly be regarded as a condition allowing Panama to invoke the clausula rebus sic stantibus against the Treaty of 1903.

Brierly's conclusion is appropriate to the Panama case:

> . . . It is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing world. That is not so; for many of these problems--and oppressive treaties are one of them--the only remedy is that states should be willing to take measures to bring the legal situation in accord with new needs, and if states are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences. Law is bound to uphold the principle that treaties are to be observed.[79]

The use of the Canal Zone for purposes other than for the maintenance, operation, sanitation, and protection of the Canal

According to Article XXIII of the Hay-Varilla Treaty, the United States was granted the right "at all times and in

its discretion, to use its police and its land and naval forces or to establish fortifications" for the safety and protection of the Canal.[80] It has been claimed, however, that the maintenance of a large number of military personnel and the stacking of vast military arsenals and defense installations throughout the Canal Zone vastly exceeds the original purpose of protecting the Canal. Eloy Benedetti maintains:

> It is not necessary to be an expert in military matters to perceive that the numerous activities and establishments of the Armed Forces on the Isthmus bear no relation whatever with the necessities of defense and neutralization of the Canal. . . . It is obvious that the military apparatus presently existent in the Canal Zone seeks ends different to those of the defense and maintenance of the neutrality of the interoceanic waterway. Everything indicates that the true mission of these military instruments is that of protecting the interests and reinforcing the politics of the United States in all Latin America, particularly in the Caribbean area. . . . It is beyond doubt that the Southern Command of the United States Army, that has its center of operations in the Panamanian territory of the Canal Zone, is the most important military and intelligence center the North Americans possess on the Continent outside of the United States.[81]

While the true military potential and defense capabilities of the installations in the Canal Zone have not been revealed for obvious security reasons, the equipment visible to the casual observer, is sufficiently impressive to substantiate Benedetti's claim. Richard Baxter concedes that

> The passage is a defensive responsibility, but the Zone also serves as a military base of substantial importance for relationships with the armed forces of the other American Republics. A certain amount of training, such as instruction in special warfare and courses for personnel of the American Republics, is carried out there. It must be realized that the Zone is a military base as well as a naval passage.[82]

It is necessary only to look carefully into Baxter's choice of words to realize what is otherwise an obvious

situation. On the other hand, it is difficult to be more specific. The charge has been made that such a situation amounts to an injustice to Panama, and to an "indescriminate use of the national territory by the Armed Forces of the United States,"[83] resulting in the violation of Article XXIII granting the right to establish fortifications "if it should become necessary" and solely for the safety and protection of the Canal.[84]

Article III of the Hay-Pauncefote Treaty which, as stated previously, is incorporated into the Hay-Varilla Treaty, states that "if it should become necessary . . . the United States . . . shall be at liberty to maintain such military police along the Canal as may be necessary to protect it against lawlessness and disorder."[85] Article XXIII of the Hay-Varilla Treaty, however, amplified the matter of safety and protection by granting to the United States the right, at all times and in its discretion to establish fortifications.[86] That Article did not stipulate the amount or type of fortifications which the United States would be allowed to erect. The only "limitation" was that these should be for the "safety and protection" of the Canal.[87]

It would be difficult indeed to determine that those defense installations and fortifications existent throughout the Canal Zone are not, in the opinion of the Canal Zone Government, necessary and vital for the safety and protection of the Canal. It is sufficient for the United States to point out that on this question it is backed by a conventional agree-

ment with Panama that clearly leaves the matter of defense to the discretion of the former.

The inequality and unfairness of the Treaty

The assertion has frequently been made that the Treaty of 1903 is unequal, contra bonos mores, and therefore void;[88] that the document was not a pactum libertatis, but a pactum subjectionis;[89] that its terms are abusive and unfair to Panama, and that it makes a "mockery of patriotic sentiment and of the intelligence of all the peoples of Spanish America."[90] This charge has been echoed for decades by Panamanians of all walks of life, and it would be difficult, in view of the arrangement created by the Treaty, not to find some measure of truth in such an allegation. While Panama's obligations under the Treaty are in no way onerous or taxing to that country insofar as performance is concerned, since this involves merely the continued "presence" of the United States, there can be little doubt that the arrangement is anachronistic and constitutes an authentic cause for indignation on the part of Panama, for reasons described before.

An analogous situation which merits discussion at this point is the attempted denunciation by Egypt of the Anglo-Egyptian Treaty of 1936 before the Security Council of the United Nations in July of 1947.[91] The Prime Minister of Egypt alleged at that time that the presence of British troops in Egypt constituted an infringement of the principle of sovereign equality, and was therefore contrary to the United Nations Charter and could not bind Egypt any longer since it had out-

lived its purpose. In presenting his case orally before the Security Council, the Prime Minister argued that the Treaty had been negotiated under international conditions that no longer existed; that the war having ended, the Treaty of 1936 had "outlived its purpose," was "obsolescent," "obsolete," "moribund," "dead," "disintegrated," and "an anachronism"; that its "political and moral force . . . [had] been spent"; that "it had lost its vitality" and "its viability"; and that "it stalks today as a phantom . . . [persisting] only as a relic of bygone buccaneer days, which the world is trying to forget" and which "has fallen by its own weight into a state of desuetude."[92]

Egypt alluded to a number of legal arguments (rebus sic stantibus; invalidity of the Treaty, since Egypt was allegedly not a free party in concluding it; conflict with prior treaty--Suez Convention of 1888--and with later treaty--U. N. Charter), but chose to center its case on the argument that the British military bases in Egypt infringed Egypt's sovereignty and independence (see n. 81 above) and conflicted with the principle of sovereign equality of the United Nations Charter.[93] The Security Council failed to agree on any resolution in this case.[94]

Briggs, in commenting on the case, maintained that it was not surprising that Egypt preferred not to rest her case on juridical arguments, since "she had no legal case."[95] He claimed that had Egypt taken the question before the International Court of Justice, that Court would have concluded that

(1) certain articles in the Treaty had authorized Britain to station troops in certain portions of Egyptian territory and the Sudan; (2) that the Treaty was still in force; and (3) that it could lawfully be terminated only by agreement between the two parties. The weakness of Egypt's legal case, he argues, brought that country to stress the political and emotional aspects of the question. Briggs concludes that

> . . . At no time was the Security Council prepared to deny the continuing validity of the treaty because of 'changed conditions' . . . . [the student of international law] may take comfort in the fact that the Security Council did nothing to undermine the legal obligation of treaties. Nevertheless, the political problem remains. The possible inertia of one of the parties in the face of stale evils, grounded as it is on legal right, suggests once again the need for more adequate international procedures for dealing with problems of peaceful change and treaty revision.[96]

While the Panama case differs in content from the Egyptian situation described above, the arguments presented by Egypt bear a striking similarity to those voicing the Panamanian position. Without entering into a comparison of the two cases, and regardless of whether Egypt's claims held more substance than Panama's, the argument presented by the United Kingdom Representative, Sir Alexander Cadogan, that "the principle pacta sunt servanda was probably the most fundamental principle of international law,"[97] reflects the prevalent attitude of jurists toward unilateral denunciations based on non-legal grounds. Panama's case rests on such considerations.

The problem here becomes one of reconciling the demands of a changing world with the principle pacta sunt servanda, without doubt one of the earliest and most underlying tenets of international law, on which the very existence and validity

of international agreements rest. The practice of international tribunals and the opinions of juridical writers have, for the most part, placed that principle above any considerations of rebus sic stantibus or any other concepts purporting to grant a right to unilateral denunciation. McNair maintains a strict view on the matter:

> No government would decline to accept the principle pacta sunt servanda, and the very fact that governments find it necessary to spend so much effort in explaining in a particular case that the pactum has ceased to exist or that the act complained is not a breach of it, either by reason of an implied term or for some other reason, is the best acknowledgement of that principle. A long series of inter-governmental discussions of this nature can be invoked to show that there is a general presumption against the existence of any right of unilateral termination of a treaty.[98]

In his extensive study on unilateral denunciation, Bhek Pati Sinha argues that

> A state party to a treaty under the dictates of this rule [pacta sunt servanda] is obliged to fulfill its obligations faithfully and is not entitled to invoke its sovereignty or moral sense to abandon its treaty obligations.[99]

The presumption against unilateral termination would appear to be even more stringent with regard to treaties creating local obligations. McNair argues that

> When a treaty . . . provides for a special regime, affecting a particular area, of commercial equality for many states, and apparently intended to be permanent, there is little doubt that other considerations would prevail and that any inference of terminability would be negativated.[100]

It is submitted then, that the attitude assumed by Panama with regard to the Treaty of 1903 may be justifiable on political, economic, and, to some extent, moral grounds--questions with which we have not proposed to deal with here

at length--but its legal case lacks substance. Law, which by its very nature is a conservative force, is bound to uphold the principle that treaties are to be observed. Unless it can be shown that a treaty is lacking in its essential validity or that the actions of one party toward the treaty constitute a breach of its stipulations--charges which Panama has been unable to substantiate--the mere distastefulness of the treaty obligations felt by one party at a later date than the time when the treaty was entered into is not of itself sufficient ground for claims to be discharged from the treaty.

There would appear to be sufficient reasons for the United States to enter into a substantial revision[101] of the Treaty in order to allow Panama some measure of satisfaction from an arrangement which today is nothing short of an anachronism, but such a remedy rests on political considerations, there being no legal obligation upon a state to revise a treaty in the absence of any provision to that effect.[102]

It may be argued that, given valid political claims for example, a system of international law disregarding these and insisting too rigidly on the binding force of treaties, will merely defeat its own purpose by encouraging their violation. Nevertheless, it is not the purpose of this study to evaluate the merits of international law, but to examine the Panama Question in the light of the law of nations in order to evaluate that situation against that standard.

The "unfairness" or "immorality" of the United States' attitude toward Panama with regard to the Treaty is a matter

properly resting at this point within the sphere of politics and diplomacy, a matter which calls for decisive action on the part of the United States to ameliorate, but which finds no infirmity in international law. One cannot but agree with Brierly's statement that international law "cannot be made an instrument for revising [treaties], and if political motives sometimes lead to a treaty being treated as a 'scrap of paper' we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not juridical action."[103]

As far as Panama's claims are concerned, Ricardo Durling remarks quite appropriately:

> Our geographic position has bound us inexorably to an interoceanic canal, and consequently, obliges us to maintain friendly relations with our neighbor, the United States; but this should not be an obstacle preventing these relations from being carried out on the basis of equality and justice, since large states as well as small states owe to each other, in carrying out their relations, respect, justice, and equity.[104]

CHAPTER II

THE QUESTION OF SOVEREIGNTY AND THE STATUS OF THE PANAMA CANAL ZONE

No single issue in the relations between the United States and Panama has so dominated the Panama Question as has the matter of "sovereignty." The emotional impact of the issue reached its peak with the cry of "soberania o muerte" only during the last decade, but debate over the question began almost immediately after the conclusion of the Treaty of 1903.

As early as 1904, the Panamanian Minister in Washington argued to Secretary Hay that ". . . the Isthmian Canal Treaty did not impart a cession of territory nor the absolute transfer of sovereignty."[105] In 1923, the prominent Panamanian jurist, Ricardo J. Alfaro, found it necessary to remind Secretary of State Charles E. Hughes that "the Canal Zone has not been sold to the United States."[106] Today, the question of which nation is in fact "sovereign" in the Canal Zone, is no less controversial.

It is not intended here to delve into the various and abstract concepts regarding the nature of sovereignty, which, as Baxter contends, "holds greater interest for the legal metaphysician than for the lawyer."[107] For our purpose, it

will be sufficient to define sovereignty as the power of a state to do as it wishes within its own territory, unless expressly forbidden to do so by international law or by special treaty obligations or agreements. With this functional meaning in mind we can turn now to a consideration of the relationship established between the United States and Panama regarding the Canal Zone, as determined by the Treaty of 1903 and its subsequent modifications, and by the practice of those states since that time.

The debate regarding "sovereignty" in the Canal Zone stems from the cautiously worded Article III of the Hay-Varilla Treaty. That article, as has been previously noted, granted to the United States ". . . all the rights, power and authority" within the Canal Zone "which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."[108]

Though the Panamanian position does not deny that "sovereign rights" were granted to the United States, the consistent claim has been that the words "if it were the sovereign" clearly and implicity indicates that the United States is not the sovereign in the Canal Zone.[109] This claim is coupled with the limitation upon that sovereignty stipulated in Article II, which granted the United States "the use, occupation and control" of the Canal Zone "for the construction, maintenance, operation, sanitation, and protection" of the Canal.[110] According to the Panamanian position over the last

sixty years, in these words are to be found the limits of the authority of the United States in the Canal Zone. Any exercise of jurisdiction by the United States not related to or necessary for the "construction, maintenance, operation, sanitation and protection" of the Canal would constitute an infringement of the sovereign rights of Panama.[111]

The United States, however, has maintained[112] that any suggestion involving any supposed limitations on its authority in the Canal Zone is removed by that sweeping grant made in Article III allowing that country to exercise all the rights, power and authority which it would possess and exercise if it were the sovereign to the entire exclusion of the exercise by Panama of any such rights.[113]

With their respective arguments, then, the two countries have held fast to their positions, Panama seeking to extract every possible interpretation from the "if it were the sovereign" clause, and the United States retaliating with citations from Article III. Panama, as a result, has had to be content with its only recognized claim--that of "titular sovereignty"--first applied by John Hay in 1904 to Panama's rights over the Canal Zone.[114]

In view of this theoretical impasse, it would be more appropriate to examine the issue in more concrete terms.

The Treaty of 1903 would seem to place only two restrictions upon the plenitude of power enjoyed by the United States in the Canal Zone. The first is that if the area should cease to be used for the support of the Canal, the

rights of the United States in the Canal Zone would come to an end. The second is that while the United States is, according to the Treaty of 1903, allowed to do whatever it likes within the Canal Zone, it cannot dispose of the territory as such. That is, it could not cede the area or part of it to a third power without the consent of Panama.[115]

Despite claims that "the treaty with Panama was a diplomatic paraphrase for annexation of the Canal Zone,"[116] these two limitations are sufficient to indicate that the Canal Zone cannot be regarded as part of United States territory, or put another way, that the United States is not the owner in fee of the Canal Zone.[117]

To what extent, then, is the exercise of sovereignty by the United States within the Canal Zone absolute? To determine this, it is necessary only to view the practice as it now exists.

With the conclusion of the treaties in 1936 and 1955, Panama obtained a number of rights in the Canal Zone relating to fiscal and economic matters,[118] such as taxation of Panamanians residing in the Canal Zone, regulation of customs and immigration, restrictions regarding the use of commercial facilities by Panamanians in the Canal Zone, the right of free transit through the area by Panamanians, their property and merchandise, and other similar rights of consensual origin. Panama has claimed that these rights have granted to that state "fiscal jurisdiction" over the Canal Zone,[119] but the claim is more hopeful than real. These rights are nothing

more than arrangements resulting from the fact that the two areas are living in close propinquity with free movement of persons from one territory to the other. Americans living in the Canal Zone, of course, are not subject in any way at all to the laws of the Republic while remaining in the Zone itself. Moreover, it is interesting to note that the Canal Zone is today a postal zone of the United States, with postal rates identical to those of the United States territories and possessions, and issuing postage stamps most of which are labeled merely "Canal Zone," not indicating the area as part of the Isthmus of Panama.[120]

In the Canal Zone, a separate body of law codified as "The Canal Zone Code" is applied. In addition to its general provisions governing the operation, maintenance, and government of the Zone, the Code comprehends civil laws, rules of civil procedure and evidence, a code of criminal law, and other laws having application solely within the Canal Zone. Magistrate courts of limited jurisdiction and the United States District Court for the District of the Canal Zone administer the laws applicable in the Canal Zone.[121] An extradition treaty between the two governments provides for the detention and delivery by one state of persons charged with crimes in the other,[122] though, unless requested, persons of one state are subject to the full jurisdiction of the other. In several instances, Panamanian citizens have been deported from the Canal Zone by decisions handed down by the District Court of the Canal Zone.[123]

The President of the United States is authorized by Congress to govern the Canal Zone through the Canal Zone Government, of which the governor--appointed by the President--is the principal officer. Maintenance and operation of the Canal and the conduct of its related business operations are carried on by the Panama Canal Company, a public corporation owned by the United States, the "stockholder" being the Secretary of the Army in his individual capacity as personal representative of the President of the United States for such a purpose. The President of the Panama Canal Company is also the Governor of the Canal Zone.[124]

With regard to defense and protection, there is a division of authority between the Governor and the Commander in Chief of the Southern Command, who commands the troops stationed in the Canal Zone, the ultimate arbiter being the President of the United States.[125]

The Canal Zone itself is, as Baxter puts it, "one great government reservation,"[126] with a civilian community similar to any of comparable size in the United States. The total population of the Canal Zone (1967) is about 49,000. American citizens employed by the Canal Company, together with their dependents, amount to some 18,000 persons. There are also residing in the Zone over 11,000 non-American citizens (chiefly Panamanians) also employed by the Canal Zone Government or the Panama Canal Company. The military forces and their families consist of nearly 20,000 persons.[127] With the exception of the Panamanians residing in the Zone, who maintain

their ties with Panama, the entire Canal Zone population constitutes a separate community which is in no way subject to the jurisdiction or administration of the Republic of Panama. Many of the United States citizens residing in the Zone have lived there all their lives. Those second and third generations born and raised in the area have, understandably, created a permanent community-type atmosphere. They attend United States schools and colleges there, form their own civic organizations, and live in virtual isolation from the neighboring communities in Panama, ". . . developing a particular state of mind not conducive to the promotion of happier relations between them and the people of Panama."[128] To Panamanians, the "Zonians" have formed a virtual colony within their own territory. Sheldon Liss remarks that

> Travelers in the Canal Zone derive the impression that they are in the midst of a gigantic military installation, and by the same token the Panamanians have felt that an important segment of their territory is occupied by the forces of the United States. This notion cannot be dispelled even when visiting the residential areas within the Zone which resemble American enclaves.[129]

It is evident from the present arrangement described, that claims of Panamanian sovereignty over the Canal Zone amount to little more than theoretical and semantical tiffs arising out of hopeful but unrealistic interpretations of the 1903 Treaty. The rights which the United States has relegated to Panama within the Zone are merely minor compromises of consensual origin relating to economic and fiscal arrangements necessary to both governments as a result of the adjacency of both areas, which have not in any way hampered or restrained

the authority of the United States within the Canal Zone. De facto, the jurisdiction and authority of the United States in that region is virtually absolute. The practice over the last sixty years has demonstrated conclusively that Panama has never exercised nor presently exercises any jurisdiction or authority over the Canal Zone. The only visible indication of Panama's "titular sovereignty" is the Panamanian flag which flies next to the United States standard on key civilian sites throughout the area. Aside from that symbolic vestige of sovereignty and in view of the practice to the contrary, the Panamanian assertions have little value.

As to the position or "status" of the Canal Zone in relation to both countries, it would be difficult indeed to classify the area in any definite terms. As far as the United States is concerned, "a cursory examination of legal sources indicates that the words 'Canal Zone' have received various interpretations for United States legislative purposes."[130] The terminology used by American Courts has been less helpful. Throughout decades of cases and legislation relating to the area, the Canal Zone has been referred to as an organized territory, a foreign territory, a territory of the United States and a possession. Its ports have been considered both as foreign ports and as ports of the United States.[131] The practice of Panama Courts has been less consistent. In some respects it has considered the Canal Zone as foreign territory and in other respects as part of the territory of Panama.[132] In reality it has made little difference, since the incon-

sistencies stem from attempts to arrive at practical results with respect to particular controversies before the courts. The confusion, of course, has been due to the curious modus vivendi that characterizes the relationship of the Canal Zone to the United States and Panama. The arrangement can be stated in these terms: while the United States enjoys the occupation, control, and jurisdiction over the Zone in perpetuity, Panama retains the legal and nominal--or "titular"--sovereignty. Put in another way, the status is one of a territory over which one state retains sovereignty while another state exercises sovereign rights. As one commentator expresses it, "If it is possible for one nation to retain 'sovereignty' and yet grant in perpetuity the exercise of 'sovereignty', then this is the existing situation."[133]

The arrangement would appear to be little more than a lease, which is, however, defined as a situation in which temporary sovereignty is exercised by the lessee state while the lessor state possesses a sovereignty in reversion.[134]

Such a situation is not without precedent. The lease of naval bases by China in 1898, Kiao-chau to Germany and other territories to Great Britain, France and Russia, made similar arrangements.[135] The occupation of Cyprus granted to Great Britain by Turkey in 1878, and the administration of Bosnia-Herzegovina granted by Turkey to Austria-Hungary in the same year are also examples of "leases" effected by international treaties. While differing from each other with regard to the extent of jurisdiction handed over to the lessee state, they

retained one common feature that can be compared to the Panama-United States arrangement: the nominal sovereignty of the territorial state was preserved while the exercise of sovereign rights was handed down to another state.[136] In the case of Panama, however, this "lease" is of a permanent nature, an apparent contradiction of terms which, nevertheless, merits application in this case.

It has been the opinion of learned writers in international law that these "leases" constituted "disguised cessions," or, since leases were for stipulated number of years, "cessions for a limited period of time."[137] Brierly states in this regard that

> There are . . . leases, political in character, in which it is usual to regard the use of the term as no more than a diplomatic device for rendering a permanent loss of territory more palatable to the dispossessed state by avoiding any mention of annexation and holding out the hope for eventual recovery.[138]

Such has probably been the case in many instances, but a true cession being a transfer of territory from one state to another international person, including the title to that territory and the actual transfer of all sovereignty to the cessionary state,[139] the Canal Zone cannot be considered as having been "ceded" to the United States.

As early as 1904, when the Minister of Panama in Washington wrote to Secretary Hay informing him that the 1903 Treaty "did not impart a cession of territory not the absolute transfer of sovereignty," he referred to the "juridical relationship" between the two countries as one of "lessor and lessee."[140]

A lease, being the "temporary" transfer of the "exercise" of sovereignty and a cession, being a "permanent" transfer of "all" sovereignty, the Canal Zone can be best described as a permanently leased territory in which nominal sovereignty and title reside with Panama, while the exercise of sovereignty in perpetuity rests with the United States. In practice, while Panama retains the title to the Canal Zone the United States enjoys this "perpetual lease" with all the effective attributes of sovereignty.

CHAPTER III

THE QUESTION OF INTERNATIONAL SERVITUDES

Many writers have held that international law recognizes certain rights over territory corresponding to the servitudes of Roman Law which have become kmown as "international servitudes."

A servitude in Roman Law was a right enjoyed by the owner of one piece of land over land belonging to another, not in his personal capacity, but in his capacity as owner of the land. The essential characteristic of such a servitude was that it was a right in rem, that is, exercisable not only against a particular owner of the servient tenement, but against any successors to the title.[141] Initially, the doctrine of servitudes was imported into international law from the private law, and many authorities are not convinced of its merits on the international plane, for reasons which will be examined shortly. It would be useful, however, to examine the concept briefly as it has been presented on the international plane before rendering any judgment as to its merits, either in international law or as it applies to the Panama Canal Zone.

Two of the foremost exponents of the concept of international servitudes are F. A. Vali and Helen Dwight Reid, both of whom have made extensive studies of their position in

the international community. According to Vali, an international servitude can be defined as

> . . . a permanent (durable) legal relationship established by a particular international treaty whereby one state, or a certain number of states, is or are entitled to exercise rights within part or the whole of the territory of another state, for a special purpose or interest relating to the territory in question . . .[142]

Vali maintains in addition, that the servitude is a relation between states, and not between a state and a foreign territory or between one territory and another; that it is essentially confined to a certain part of the grantor state; that it restricts the territorial sovereignty of the grantor state, and exists when one (or more) states are entitled to exercise or to enjoy a right of a "territorial character" in foreign territory to which it would not be entitled under general international law.[143] The scope and application of the concept, according to Vali, is vast, depending on the type of relationship involved and the nature of the restriction imposed on the sovereignty of the grantor state. In practice, he maintains, these servitudes have included fishery rights, leases in foreign ports, rights of transit, use of common railway stations, rights of transit on waterways (rivers open to certain states), customs-free zones, mining rights, grounds for guided missiles and practice bombing, military bases in foreign territories, demilitarized areas, administration of foreign territories, and other related arrangements, such as the Headquarters of the United Nations and the position of the Holy See.[144] All, of course, involve restrictions of territorial

sovereignty in which certain rights are created in a foreign territory for one purpose or another.

The manner in which the treaty disposes of the area, that is, as "range areas," "leases," "bases," "sites," "zones," or "areas" is, according to Vali, not of consequence.[145] According to his classification scheme, the Panama Canal Zone falls within the categories of "economic and military servitudes" and "administration of foreign territory," the latter being a situation in which "the sovereignty of the territorial state is expressly preserved while the exercise of sovereign rights is handed over to another state"; there is no transfer of territorial sovereignty nor a cession, but only a complete transfer of jurisdiction.[146]

Helen Reid, adopts a similar approach to the concept of servitudes. She defines these as

> . . . a real right, whereby the territory of one state is made liable to permanent use by another state, for some specified purpose. The servitude may be permissive or restrictive, but does not involve any obligation upon either party to take positive action. It establishes a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant state, or by consolidation of the territories affected.[147]

While Reid's classifications regarding types of servitudes are otherwise similar to Vali's, she places the American rights in the Canal Zone under the varied rubrics of "waterway construction servitudes," "interoceanic transit servitudes," and "strategic servitudes."[148]

While some prominent writers in the field have subscribed

to the concept of servitudes in international law, such as Oppenheim[149] and Starke,[150] the doctrine occupies at best a questionable position in international law. Since servitudes are by definition rights in rem, those rights should be ones that would survive a change in the sovereignty of either of the two states concerned. Brierly contends that there is no real evidence that any such right actually exists in the international system.[151] Though the concept has encountered strong opposition from the modern sovereign state, its application to international life has been questioned even by earlier writers. According to Pitman Potter,

> The servitude at international law is doomed first, by reason of the severe blows dealt it by the dogma of sovereignty and independence; second, by the general breakdown of that proprietary competitive system of which it is a part.[152]

While the Courts have not tacitly denied the existence of servitudes in international law, they have been cautious in their endorsement of such a concept. In the leading case known as the North Atlantic Coast Fisheries Arbitration in 1910, for example, the United States argued that a treaty concluded in 1818 between Great Britain and that country had created a servitude in their favor regarding fishery rights off the coast of Newfoundland. The Permanent Court of Arbitration rejected the contention, ". . . because there was no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818. . . ." The Court also stated that the ". . . doctrine . . . [was] but little suited to the principle of sovereignty

which prevails in states under a system of constitutional government . . . and to the present international relations of sovereign states. . . ." The concept, the Court maintained, had ". . . found little, if any, support from modern publicists."[153]

In the later case before the Permanent Court of International Justice in 1923 of the S. S. Wimbledon, it was argued that the right of passage through the Kiel Canal was a state servitude, but the majority of the Court did not agree, stating that ". . . the Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law."[154]

While it would be convenient to class the Canal Zone as a servitude, it would also be confusing as well as inexact in view of the lack of agreement among writers and jurists regarding its domain--if any--in international law. A concept taking for granted the willingness of a sovereign state to yield to the interests of the world at large is unrealistic, and in the case of the Canal Zone, inapplicable. In addition, the test of a servitude, whether it will survive a change in the sovereignty of the two states concerned, can rarely be applied in international life, and it would be fanciful to imagine such a situation occurring with the Canal Zone.

CHAPTER IV

THE STATUS OF THE PANAMA CANAL

Before entering into a discussion of the international status of the Panama Canal, it is necessary to distinguish the juridical position of that waterway itself from the Canal Zone proper. While the Canal Zone exists for the operation, administration and defense of the Canal, we are in reality considering two distinct entities. When speaking of the Canal Zone, we are referring to the territory surrounding the Canal which was granted to the United States by Panama in 1903, and which is occupied by United States for carrying out the Canal enterprise. When speaking of the Panama Canal, we are referring to the waterway itself, which, by virtue of its use by the international community, has supposedly attained a special status together with two similar waterways, the Kiel and Suez Canals. These two other waterways do not require a distinction such as that mentioned above, since they are both operated by the "territorial sovereigns" through which the Canals lie, while the Panama Canal is operated by a "foreign sovereign." That is, whereas the Kiel Canal is operated by Germany and the Suez Canal (since its nationalization in 1956) by Egypt, the states through which each waterway traverses, the Panama Canal is not operated by Panama, but by a nation

granted full powers of jurisdiction within the Canal Zone--that area already discussed which has been provided by Panama as the territorial base from which the Canal might be constructed, managed, and defended.

Let us consider briefly now the main reasons for which these three Canals are said to occupy a special status in international law.

One reason might be geographic. Unlike rivers and straits which are natural waterways, interoceanic canals are artificially constructed.[155]

Another reason is based on the pseudo-legal assumption that these interoceanic canals have been "dedicated" to the use of the world's maritime commerce, thereby making them "international canals." Baxter applies the term "international" with caution, defining "international waterways" as

> those rivers, canals, and straits which are used to substantial extent by the commercial shipping or warships belonging to states other than the riparian nation or nations.[156]

A legal standard, however, has been imposed on the three Canals by virtue of the so-called freedom of navigation provided for in the international agreements on which each is based and by customary law which has sought to impart to these agreements the character of a "dedication." In the Wimbledon Case in 1923, for example, the Permanent Court of International Justice, in deciding against Germany's right to close the Kiel Canal to belligerent vessels, stated inter alia that

> . . . the Canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world.[157]

The distinction, then, between a national and an international canal was supposedly to be found in the nature of the navigation prevailing in it. If navigation is left to the discretion of the territorial state, the canal is national. If there is freedom of navigation for all nations of the world, the canal is "international."[158] In deciding the Wimbledon Case, the Court took it upon itself to base its decision on the "precedents . . . afforded by the Suez and Panama Canals,"[159] and assimilated these to the position of natural straits. As Schwarzenberger maintains, "the common denominator was supposed to consist in the permanent dedication of both straits and inter-oceanic canals to the use of the whole world."[160] The extent of that dedication will be examined more closely in a subsequent portion of this discussion.

Another criteria said to characterize the three interoceanic Canals is their importance to the international shipping community.[161] While the question of importance is, of course, a relative one, Baxter maintains, nevertheless, that the three interoceanic Canals--Suez, Panama, and Kiel--"are indubitably of international concern," not only in terms of the number of users, but in terms of the reliance by nations on the passages for certain essential products or for the export of raw materials and manufactured products.[162]

Also, the three Canals have their bases on international agreements--Panama on the Hay-Pauncefote and Hay-Varilla Treaties, Kiel on Article 380 of the Treaty of Versailles of 1919, and Suez on the Suez Canal Convention of 1888 and the Egyptian Declaration of 1957.[163]

In the face of these practical considerations mentioned above, the three Canals are often said to enjoy a special status or regime of their own. Before examining the nature of a "regime" and determining whether there does in fact exist an "international canal regime" we will consider first the position of the three Canals insofar as they are said to be "internationalized," that is, the extent to which there exists a dedication to world use and to the freedom of transit.

According to Article I of the Suez Canal Convention, to which all the great European powers and some others were party, the Suez Canal was to be ". . . free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag," and the Canal was never to be blockaded.[164] As a result of the nationalization of the Canal by Egypt in 1956, an issue too complex for treatment here, Egypt issued a declaration the following year solemnly re-affirming her intention to respect the terms and the spirit of the 1888 Convention,[165] thereby producing no actual change in the status of the waterway as an "international canal." In practice, however, the guarantee of free transit has not held true. During World War I access to the Canal was denied to German and Austrian vessels. Those ships endeavoring to

utilize the ports of Suez and Said were ordered to leave, and on refusing, were taken outside the three mile limit, captured, and condemned.[166] During World War II, the Canal was closed to Italian men-of-war.[167] During the Palestine hostilities between Egypt and Israel in 1948-1949, the Egyptian government claimed the right to visit, search, and capture vessels passing through the Canal, alleging that a state of belligerency existed with Israel which allowed such measures to be taken. The Egyptian Prize Court agreed, on the grounds that no prohibitions could affect the natural right of a state to preserve its own existence.[168] Since that time, Egypt has deemed it necessary to create restrictions and deny access to the Canal of ships trading with Israel, Israeli merchant vessels, and the ships of various nations, on several occasions too numerous to mention here.[169] Whether an actual state of war has existed during most of these instances, would seem to make little difference. For the most part, it can be safely stated that in those instances where the passage of a ship was deemed contrary to the interests of Egypt, that country has not hesitated in taking what it considers to be the necessary preventive measures.

The Kiel Canal, constructed by the German Government in 1896, was, according to Article 380 of the Treaty of Versailles, to be ". . . free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[170] In 1921 when war between Russia and Poland had not yet been terminated, Germany refused passage

through the Canal to the S. S. Wimbledon, a British vessel on its way to Danzig with a cargo of munitions consigned to the Polish mission there. Germany refused access to the Canal on the ground that she wished to maintain her neutrality. The dispute was referred to the Permanent Court of International Justice which held, applying the so-called "rules established with regard to the Suez and Panama Canals," that such a waterway, having been dedicated to the use of the whole world, was assimilated to natural straits in the sense that the passage of belligerent men-of-war, or belligerent or neutral merchant ships carrying contraband would not be regarded as incompatible with the neutrality of the riparian sovereign.[171] As had been stipulated in the Treaty of Versailles, however, Germany would have been entitled to close the Canal to vessels at war with that country.[172]

On November 14, 1936, the German Government denounced the Treaty of Versailles and set up regulations requiring foreign warships and naval craft to obtain permission through diplomatic channels before being allowed to use the Canal.[173]

The rules regarding the neutrality of the Panama Canal are contained in Article III of the Hay-Pauncefote Treaty, which is embodied in the Hay-Varilla Treaty.[174] According to that article, the United States adopted ". . . as the basis of the neutralization of such ship canal," a number of rules ". . . substantially as embodied in the Convention of Constantinople." Among other things,

> the Canal shall be free and open to the vessels of commerce and of war of all nations . . . on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.[175]

The Canal was never to be blockaded, nor any right of war exercised nor any act of hostility committed within it.[176] According to Article XXIII of the Hay-Varilla Treaty, however, the United States maintained the right at all times to establish fortifications for the safety and protection of the Canal.[177]

With the outbreak of World War I, a proclamation issued by the President of the United States in November of 1914 placed no restriction on merchant vessels, but regulated the passage of belligerent warships and prizes ". . . in order to maintain both the neutrality of the Canal and that of the United States. . ."[178] After the entrance of the United States into the War, a proclamation enacted by the President in April of 1917 provided that ". . . no vessel or war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy, shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone. . . ."[179]

By the Treaty of 1936 between Panama and the United States it was agreed that

> . . . in the event of an international conflagration or of the existence of any threat of aggression which endangers the security of the Republic of Panama or the neutrality or the security of the Panama Canal, the Governments of the Republic of Panama and the United States will take such measures of prevention and defense as they consider necessary for the protection of their common interests.[180]

In 1939 a proclamation issued by the President of the United States again prescribed regulations regarding the passage of belligerent vessels.[181] These regulations, later incorporated in 1960 in the Canal Zone Regulations, stated:

> 1. Whenever considered necessary, in the opinion of the Governor of the Panama Canal, to prevent damage or injury to vessels or to prevent damage or injury to the Canal or its appurtenances, or to secure the observance of the rules, regulations, rights or obligations of the United States, the Canal authorities may at any time, as a condition precedent to transit of the Canal, inspect any vessel, belligerent or neutral, other than a public vessel, including its crew and cargo, and, for and during the passage through the Canal, place armed guards thereon, and take full possession and control of such vessel, and remove therefrom the officers and crew thereof and all other persons not specially authorized by the Canal authorities to go or remain on board thereof during such passage.
>
> 2. A public vessel of a belligerent or neutral nation shall be permitted to pass through the Canal only after her commanding officer has given written assurance to the authorities of the Panama Canal that the rules, regulations, and treaties of the United States will be faithfully observed.

The Canal Zone Regulations further provides for a number of necessary conditions regarding the actual passage of vessels of war other than those of the United States.[182]

In 1942, after the entrance of the United States into the War, a proclamation by President Roosevelt declared Cristobal and the Gulf of Panama as "maritime control areas" for purposes of defense and protection, and naval forces were deployed about the Canal in order to protect its sea approaches from Japanese and German warships.[183]

It would appear, then, from the practice of these three Canals, that the right of free passage has yielded in certain instances to the realities of their strategic importance.

Despite their so-called neutralized status, both the Suez and Panama Canals have been attacked by enemies and have necessarily been defended by those states for whom these channels possess special importance. The Suez Canal has been the scene of hostilities and the object of attack on several occasions, and the approaches to the Panama Canal were defended by American naval forces during the Second World War, when German and Japanese warships were found operating in the area. German ships in Canal Zone waters were actually seized by the United States during the First World War.[184] It is not surprising either that Germany, conscious of the importance of the Kiel Canal to its military adventures, closed the Canal in 1937 to warships of foreign states, unilaterally denouncing the relevant provisions of the Versailles Treaty.[185]

The closing of an interoceanic canal to enemy ships is only a matter of common sense, and measures designed to keep such vessels out of the vicinity are no less so. Despite the decision in the Wimbledon Case whereby the passage of a belligerent ship would not compromise the neutrality of the riparian state, it is foolhardy to believe that the riparian sovereign will refrain from taking measures necessary to protect the safety and security of its waterway,[186] acts which these states have repeatedly found it prudent to do.

It must be noted, however, that the provisions regarding "neutrality" in each of the treaties on which the three interoceanic Canals are based, have not in themselves guaranteed their neutral status to the rest of the world. The Suez

Canal, according to the Suez Convention, was to be "free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag." Article X of that convention stipulated clearly, nevertheless, that such provisions

> . . . shall not interfere with the measures which His Majesty the Sultan and His Majesty the Khedive . . . might find it necessary to take for securing by their own forces the defense of Egypt and the maintenance of public order.[187]

In the case of the Kiel Canal, that waterway was to be maintained "free and open to the vessels of commerce and of war of all nations at peace with Germany. . . ."[188] A war in which Germany was a belligerent entitled her to close the Canal to enemy ships.

In the case of the Panama Canal, while it is stipulated that "the Canal shall be free and open to the vessels of commerce and of war of all nations. . .,"[189] the Hay-Pauncefote Treaty is silent with respect to the freedom of transit in time of war, and the Hay-Varilla Treaty grants the United States the right to erect such fortifications as it deems necessary for the safety and protection of the Canal.[190]

It is also interesting to note that the United States has never entered into any treaty or convention with any other state except Great Britain and Panama, obliging it to maintain the Canal free and inviolable. In the case of Suez, not only the nine contracting powers, but, according to Article XVI of the Suez Canal Convention, any state wishing to accede to that Convention may claim the advantage of its

provisions.[191] The Kiel Canal is similarly governed by a treaty which, in numerical terms, only a small minority of the international community is privy.[192]

There is, of course, much disagreement on the nature of "neutrality" insofar as interoceanic canals are concerned. Some writers have subscribed to the view that rules of neutrality demand that a canal be closed to the warships of belligerent nations.[193] Since the agreements relating to the Suez, Panama, and Kiel Canals allow the passage of belligerent warships, these Canals, according to this view, are not neutralized. Another view which, for example, was propounded by the British delegates to the Paris Conference in 1885, states that the term neutrality has reference only ". . . to the neutrality which attaches by international law to the territorial waters of a neutral state, in which a right of innocent passage for belligerent vessels extends, but no right to commit any act of hostility."[194] The practice of Egypt, the United States, and Germany regarding their treatment of belligerent vessels in time of peace, while not entirely restrictive, has at least been regulatory.[195] The attitude of Egypt toward Israel and Israel-bound merchant vessels of other nations,[196] the restrictions on the passage of belligerent vessels through the Panama Canal prior to the United States' entrance into both World Wars[197] and the "discriminatory" treatment of Soviet[198] vessels passing through the Canal, and the regulations set up by Germany for the passage of foreign warships in 1936,[199] could not permit us to describe

the passage of belligerent warships through these Canals as any form of guarantee, and much less as a right.

Drawing simply from the practice of these countries we would have to submit that the three interoceanic Canals--Panama and Suez in particular--are not neutral waterways, since they have been defended by their interested states in their own interest and have ceased to grant full freedom of passage during time of war or when they have deemed such passage contrary to the safety of their canal.

As regards the existence of an interoceanic Canal "regime," it is necessary only to observe the repeated use of the word by writers who have applied the term merely to connote the existence of a special status due to a link in the nature and practice of the three interoceanic Canals. As Hackworth observes,

> While interoceanic canals possess vital commercial and strategic importance, these practical considerations do not of themselves endow them with a special legal status. Their position internationally is dependent upon their particular historical background and the international engagements which may have been entered into respecting them.[200]

J. A. Obieta, in his study concerning the legal status of the Suez Canal, arrives at a classification of four types of regimes, the special regime of international canals being given the title of "regime of internationality," by which is meant

> . . . the legal status of a canal in which there is internationally guaranteed freedom of navigation in time of peace for the merchant vessels of all nations.[201]

As can be noted, the matter of passage of belligerents

in time of peace and merchant vessels in time of war is purposely excluded since, according to Obieta, the territorial sovereign is perfectly entitled to close the canal under such conditions.[202] While Obieta's approach is a cautious one, it is, nevertheless, unrealistic. Theoretically, in the case of the Panama Canal, the United States avoided bestowing any rights on third parties, Great Britain and Panama being the only parties the United States has concluded treaties with regarding the Canal. To this day, the United States remains answerable only to these two countries insofar as freedom of transit is concerned. In the case of the Suez, the obligations involve the nine contracting parties and any state acceding to the Suez Convention. In theory at least, the Suez Canal was "dedicated" as a waterway for international use, both by the Suez Convention and by the reaffirmation in the Egyptian Declaration of 1957, as was the Kiel Canal according to the Permanent Court in the Wimbledon Case.[203] Such a "dedication" cannot be assumed in the case of the Panama Canal or implied from the Hay-Pauncefote and Hay-Varilla Treaties. The intention of the United States seemed clearly to be one of limiting legal rights of passage to the actual signatories. Third parties using the Canal enjoy a benefit granted to them by treaty, but they possess no right to the use of the Canal. Moreover it is interesting to speculate to what extent the "dedication" made by the Suez Convention to the international use of the Canal has actually created any more legally-enforceable rights in favor of non-signatories than have the treaties relating to the Panama Canal. Notwithstanding these

dedications and so-called rights of free transit, the fact remains that these waterways are subject to the territorial jurisdiction of the sovereigns across whose territory they traverse.

In the case of straits, a regime might be said to exist deriving its legal status from a number of treaties, declarations and authoritative pronouncements. It has been maintained that the right of free passage through international straits is but one aspect of the freedom of the seas. Without the right of passage from one portion of the high seas to another through those natural passages, the freedom of the seas would be impaired.[204] Interoceanic canals, however, do not by the mere fact of their construction automatically become international highways. Put in simple terms, a state has no obligation to construct an interoceanic canal in the first place. Having created one, there does not seem to be any reason in principle why it should be required to make it available to all, much less allow the unrestricted use of the same.

A regime such as that suggested by Obieta, then, by which the interested states have voluntarily accepted a permanent limitation of their sovereignty in favor of the freedom of navigation, is inconsistent with the nature and practice of interoceanic canals as well as with the realities of the modern sovereign state. Similarly, claims regarding the "internationalization," "neutralization," or "guaranteed freedom of transit" of these canals do not appear to be legally persuasive.

Nevertheless, it would also be unrealistic to discard entirely the concept of a canal regime. The opening of three major interoceanic canals based on grants noticeably similar in their terms and for virtually identical purposes, have, throughout the years, created a common canal practice. Though we have deemed it inaccurate to say that these waterways are "internationalized," their consistent use--particularly the Suez and Panama Canals--by the major shipping nations of the world, has placed a functional link among them. In times of peace at least, the freedom of transit through these Canals have, for the most part, remained untrammeled, and problems of discriminatory treatment have been minimal. While the nations of the world at large possess no rights to the use of these waterways, since they have been enjoying a benefit granted them at the discretion of the territorial sovereigns concerned, that benefit has been a substantial one.

By virtue of their existence as three unique artificial waterways, based on similar grants and serving as significant passages on which much of the world's important commerce depends, and functioning in a comparable manner, it is submitted that an interoceanic canal regime does in fact exist; but such a canal regime would be a product of historical and functional considerations and dependent entirely on the territorial sovereign, in which freedom of navigation is, for the most part, granted, but not guaranteed. In a legal sense, the Suez, Kiel, and Panama Canals remain the products of the instruments which created them and of the sovereigns which administer them.

REFERENCES TO PART II

[1]Treaties and Acts of Congress, p. 18.

[2]Ibid., pp. 18-25. (Italics mine); see also William M. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, Vol. II (Washington, 1910), pp. 1349-1357. Hereinafter cited as Malloy, Treaties.

[3]Ibid., see Article XIV. See also n. 8 and n. 15 below for later adjustments in the annuity payment.

[4]King, op. cit., p. 197; the cities of Panama and Colon were occupied in June of 1918 as a result of election disturbances. The Province of Chiriqui was occupied for almost two years beginning in July of 1918 for similar reasons, and at the request of the Panamanian Government, but troops refused to move out for fear of the danger to American citizens residing in the area. Chorrera was occupied in 1921, apparently while a military map of the Isthmus was being prepared. In October of 1925, troops intervened in Panama City at the request of President Chiari to quell local disturbances; see also Ricardo J. Alfaro, "Medio Siglo de Relaciones entre Panama y los Estados Unidos," Loteria (Panama, March, 1964), p. 149.

[5]See Historia Documental, pp. 425-452.

[6]McCain, op. cit., p. 197.

[7]Historia Documental, pp. 458-474; see also British and Foreign State Papers, 1936, Vol. 140 (London, 1948), pp. 887-897.

[8]Ibid.

[9]Domingo H. Turner, Tratado Fatal (Mexico, 1964), p. 106.

[10]Alfaro, op. cit., p. 156.

[11]Ricardo M. Arias E., "Las Relaciones de Panama y los Estados Unidos," Loteria (Panama, March, 1964), p. 171.

[12]King, op. cit., p. 127.

[13]See n. 2 above.

[14]Historia Documental, pp. 511-526; see also British and Foreign State Papers, 1955-1956, Vol. 162, pp. 512-524.

[15]Ibid.

[16]Historia Documental, pp. 529-537.

[17]Charles G. Fenwick, "The Treaty of 1955 between the United States and Panama," American Journal of International Law, Vol. 49 (1955), p. 545.

[18]Turner, op. cit., p. 106.

[19]See Part I, n. 116 above; it is interesting to note the tenor of Panama's argument in view of the General Assembly Resolution of December 1952, affirming the right of peoples to the use and exploitation of their own natural wealth and resources. See General Assembly Resolution 626 (VII), Yearbook of the United Nations, 1952, p. 390. See also the Resolutions of the General Assembly in the form of a Declaration on Permanent Sovereignty over Natural Wealth and Resources. Resolution 1803 (XVII), December 14, 1962, American Journal of International Law, Vol. 57 (1963), p. 710.

[20]The unequal treatment of Panamanian workers in the Canal Zone during this time involved less pay than American workers for equal work, unfavorable working conditions, and less benefits than American workers. To this day, Panamanians working in the Canal Zone are paid 15% less ("differential pay") than Americans doing similar work. R. R. Baxter and Doris Carroll, "Causes of Conflict between the Two Countries," The Panama Canal: Background Papers and Proceedings of the Sixth Hammarskjold Forum, edited by Lyman Tondel (New York, 1965), pp. 26-31.

[21]Ibid., pp. 14-15.

[22]Prior to this time, the Panama flag had never been allowed to fly in any part of the Canal Zone. "Report on the Events in Panama, January 9-12, 1964," prepared by the Investigating Committee appointed by the International Commission of Jurists (Geneva, 1964), p. 12.

[23]Ibid.

[24]Baxter and Carroll, loc. cit.

[25]International Commission of Jurists, loc. cit.

[26]Baxter and Carroll, op. cit., p. 6.

[27]Drafts of proposed Panama Canal Treaties: "New Canal Treaty"; "New Canal Defense Treaty"; "New Sea Level Canal Treaty"; published in The Panama American, July ?, 1967.

[28]The Panama American, December 14, 1967; in August of 1967 a group of over one-hundred prominent civic and governmental persons in Panama, in a signed statement to the press, repudiated the three draft agreements. Critica, Panama, R. P., August 24, 1967, p. 19.

[29]The Panama American, December 14, 1967, p. 2.

[30]Ibid.

[31]Statement by Joseph S. Farland, former United States Ambassador to Panama, in Baxter and Carroll, op. cit., p. 48.

[32]Ibid., p. 9. While the strategic importance of the Canal has declined somewhat since the two world wars, when it was used as an essential instrument of national defense, the use of parts of the Canal Zone for military bases and its convenient location have made the area of prime importance for hemispheric defense, particularly in the Caribbean. See Eloy Benedetti, "Informe sobre los Canales de Panama y Suez," in Tres Ensayos Sobre el Canal de Panama (Panama, 1965), pp. 45-57; Baxter considers the Canal "of enormous significance to U. S. Commerce," the United States being the largest user of the waterway. See Baxter and Carroll, op. cit., p. 10.

[33]These claims have been maintained by the following: Francesco Consentini (University of Brussels and Turin) in "Los Tratados y las Convenciones de la Zona del Canal de Panama," Anuario de Derecho de la Universidad de Panama, VII (Panama, 1966-67), pp. 172-3; Dr. Guillermo Garcia Montufar (Dean of the Faculty of Law of the University of San Marcos, Lima, Peru) in "Conferencia Sobre las Relaciones de Panama y los Estados Unidos," University of Panama (Panama, 1966), pp. 33-44; Domingo H. Turner (Panamanian lawyer), loc. cit.; Thelma King (former Panamanian assemblywoman), loc. cit.

[34]Miner, op. cit., pp. 375-6; Turner, op. cit., pp. 42-5; King, op. cit., p. 71; See also Note of Ricardo J. Alfaro, Minister of Panama in Washington, to Secretary of State Charles E. Hughes, January 3, 1923, Historia Documental, pp. 365-367.

[35]Turner, op. cit., pp. 42-45.

[36]McCain, op. cit., p. 225.

[37]Turner, op. cit., pp. 44-45; see also Harding, op. cit., Chapter I.

[38]Gaceta Oficial del Gobierno de la Republica de Panama, No. 6., December 15, 1903, p. 1.

[39]Turner, op. cit., pp. 49-53. For a similar situation regarding the position of treaties with regard to internal changes and changes in the constitution, see the case of the Tinoco Concessions between Great Britain and Costa Rica. (1923) 1 R.I.A.A. p. 369, in L. C. Green, International Law Through the Cases, 2d ed. (London, 1959), pp. 84-91.

[40]See for example King, op. cit., p. 565, and Montufar, op. cit., pp. 41-42.

[41]Messrs. Arango, Boyd, Arias, to Mr. Hay, Nov. 6, 1903, Messages and Papers, IV, p. 6757.

[42]See n. 38 above.

[43]Treaties and Acts of Congress, p. 18.

[44]See Miner, op. cit., pp. 378-385.

[45]Consentini, op. cit., p. 172.

[46]Messages and Papers, IV, pp. 6852-6853; see also Moore, Digest, III, pp. 110-112.

[47]Thomson-Urrutia Treaty, April 6, 1914, between the United States and Colombia, Historia Documental, p. 354; see also Malloy, Treaties, III, pp. 2538-2544.

[48]See n. 7 above.

[49]"Constitution of the Republic of Panama," March 1, 1946, in Amos J. Peaslee (comp.), Constitutions of Nations, Vol. III, 2d ed. (The Hague, 1956), p. 68.

[50]Ibid., p. 104.

[51]Ibid., p. 70.

[52]Consentini, op. cit., p. 172, and Turner, op. cit., p. 97.

[53]See n. 2 above.

[54]Kaye Holloway, Modern Trends in Treaty Law (London, 1967), pp. 316, 320 (Italics mine). In the case of the Georges Pinson Claim in 1928, the French-Mexican Claims Commission maintained that "The thesis which the arbitrator very properly formulated in the Montijo Case, namely, that a treaty is 'superior to the constitution, which the latter must give way, . . . the legislation of the republic must be adapted to the treaty, not the treaty to the laws,' is of equal validity with respect to the mutual relations between the constitution and unwritten

international law." French-Mexican Claims Commission, (1928), 5 R.I.A.A., p. 327, in Green op. cit., p. 735.

[55]See n. 2 above.

[56]See n. 63 below.

[57]See for example the note of Ricardo J. Alfaro to Charles E. Hughes, Historia Documental, pp. 365-367; Eloy Benedetti, loc. cit., and Ricardo M. Arias, former President of Panama, in his "Speech before the North American Society of Panama," Revista Ande (Panama, May 24, 1961), p. 6.

[58]George W. Westerman, "La Otra Version de las Relaciones entre Panama y Los Estados Unidos," in Loteria (Panama, December 1959), p. 12.

[59]See King, op. cit., p. 56; Turner, op. cit., p. 80; Consentini, op. cit., p. 172.

[60]Montufar, op. cit., p. 38 (Translation mine).

[61]Kelsen, op. cit., p. 34.

[62]McNair, op. cit., p. 494.

[63]Montufar, op. cit., p. 34; Turner, op. cit., p. 86.

[64]See McNair, op. cit., p. 681.

[65]"According to the view of the United Kingdom Government, no such tacit condition can be implied in treaties, and if it is desired to import such a condition, it must be done so expressly." McNair, op. cit., p. 682.

[66]Ibid., p. 683 (Italics mine).

[67]Ibid., p. 685 (Italics mine).

[68]Ibid., p. 688.

[69]P.C.I.J. (1923), Series B, No. 4. Hudson, World Court Reports, Vol. I, pp. 159-160.

[70]P.C.I.J. (1932), Series A/B, No. 46. Hudson, World Court Reports, Vol. II, pp. 471, 477, 553-555.

[71]McNair, op. cit., p. 690 (Italics mine).

[72]J. L. Brierly, The Law of Nations, 6th ed., edited by Sir Humphrey Waldock (Oxford, 1963), p. 336 (Italics mine).

[73]Kelsen, op. cit., p. 498.

[74]Schwarzenberger, Manual, p. 170.

[75]See Brierly, op. cit., p. 335, and Kelsen, op. cit., p. 499.

[76]See Kelsen, op. cit., p. 49f.

[77]See Ingrid Detter, op. cit., p. 99; see also Charles G. Fenwick, International Law, 4th ed. (New York, 1965), p. 545. See for example the debates on the Law of Treaties and the "Report to the General Assembly," of the International Law Commission, Yearbook of the International Law Commission, 1962, Vol. I, II; see especially the "Rules Governing the Conclusion of Treaties by States," in Vol. II, pp. 38-68. The Harvard Research, in its draft on the Law of Treaties, considered the clausula applicable only when declared so by a competent international tribunal or authority; see Article 28, in American Journal of International Law, Vol. 29, Sp. Supp. (1935).

[78]Baxter and Carroll, op. cit., p. 10.

[79]Brierly, op. cit., p. 329.

[80]Treaties and Acts of Congress, p. 24.

[81]Benedetti, op. cit., pp. 66-67. (Translation and Italics mine.)

[82]Baxter and Carroll, op. cit., pp. 38-39 (Italics mine). Benedetti provides a percentage breakdown of the use made by the United States of the 372.32 square miles comprising the Canal Zone as follows: operation of the Canal, 3.5%; swampland, 4.1%; unused, 51.2%; military bases, 37%. Benedetti, op. cit., pp. 70-71.

[83]Benedetti, op. cit., p. 72.

[84]Treaties and Acts of Congress, p. 16; see also Consentini, op. cit., p. 172, and Turner, op. cit., p. 85.

[85]Treaties and Acts of Congress, p. 16.

[86]Ibid., p. 24. (Italics mine.)

[87]Ibid.

[88]Montufar, op. cit., pp. 37-38.

[89]Consentini, op. cit., p. 170.

[90]King, op. cit., p. 71; see also Westerman, loc. cit.

[91]Herbert W. Briggs, "Rebus sic Stantibus before the Security Council: the Anglo-Egyptian Question," American Journal of International Law, Vol. 43 (1949), p. 763; see also Security Council, Official Records, 2d year, No. 59, July 17, 1947, pp. 1343-1344.

[92]Briggs, op. cit., pp. 763-765; see also Security Council, Official Records, 2d year, Nos. 70-86.

[93]See U. N. Charter, Article 2.1.

[94]Security Council, Official Records, 2d year, No. 88. See also Briggs, op. cit., p. 768.

[95]Briggs, op. cit., pp. 768-769.

[96]Ibid.

[97]Security Council, Official Records, 2d year, No. 70, August 5, 1947, p. 1772.

[98]McNair, op. cit., p. 493.

[99]Bhek Pati Sinha, Unilateral Denunciation (The Hague, 1966), p. 77. (Italics mine.)

[100]McNair, op. cit., p. 505.

[101]See n. 27 above.

[102]McNair states: "As a question of law, there is not much to be said upon the revision of treaties. It frequently happens that a change in circumstances may induce a government on political grounds to accede to the request of another government for the termination of a treaty and for its revision in the light of new circumstances. But as a matter of principle, no state has a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in that treaty or in some other treaty to which it is a party; a revised treaty is a new treaty, and, subject to the same limitation, no state is legally obliged to conclude a treaty. McNair, op. cit., p. 534 (Italics mine); see also Detter, op. cit., p. 71.

[103]Brierly, op. cit., p. 339.

[104]Ricardo A. Durling, "Intervencion de los Estados Unidos en los Asuntos Internos de Panama," Anuario de Derecho, No. 3 (Panama, 1958), p. 174.

[105]J. D. De Obaldia to John Hay, August 11, 1904, Historia Documental, p. 257.

[106]Ricardo J. Alfaro to Charles E. Hughes, January 3, 1923, loc. cit., p. 375.

[107]R. R. Baxter, The Law of International Waterways (Mass. 1964), p. 87. Hereinafter cited as Waterways.

[108]See n. 2 above.

[109]Dr. Carlos Cabezas Luna, El Derecho de Panama (Madrid, 1959), p. 53; see also Benedetti, op. cit., p. 8.

[110]See n. 2 above.

[111]See Luna, op. cit., pp. 53-56, and Baxter, Waterways, p. 74.

[112]Charles E. Hughes to Ricardo J. Alfaro, Oct. 15, 1923, loc. cit., pp. 382-421; Baxter, op. cit., p. 14; Benedetti, op. cit., p. 8.

[113]See n. 2 above.

[114]Hay to Obaldia, Oct. 24, 1904, loc. cit., pp. 275-311.

[115]See F. A. Vali, Servitudes in International Law, 2nd ed. (New York, 1958), p. 257, and Baxter, Waterways, p. 78.

[116]Miller, op. cit., p. 232.

[117]In an opinion rendered by the Supreme Court of the Canal Zone on May 6, 1907 in the case of Canal Zone v. Coulson, it was decided that the United States was not the owner in fee of the Canal Zone, since it had only the use and occupation of that land as long as it complied with the terms of the Treaty. Treaties and Acts of Congress, p. 23.

[118]See n. 8 and n. 16 above.

[119]See Luna, op. cit., p. 60.

[120]Ibid., pp. 20-23. Until the year 1924, the Canal Zone used postage stamps labelled "Canal Zone" but bought from Panama at reduced rates. In that year, the Canal Zone Government discontinued the practice and began issuing its own stamps, apparently for economic reasons; see Hackworth, Digest, II, p. 170.

[121]The Court of Appeals, Fifth Circuit, has appellate jurisdiction from the United States District Court for the District of the Canal Zone. Whiteman, Digest, III, pp. 1164, 1255. International Commission of Jurists, op. cit., pp. 11-12; Baxter and Carroll, op. cit., pp. 20-21.

[122]Baxter, Waterways, p. 81; Whiteman, Digest, III, p. 1171.

[123]The author, on several occasions, has assisted as interpreter at the District Court for cases involving deportation of Panamanian citizens from the Canal Zone and violations of deportation orders.

[124]Whiteman, Digest, III, pp. 1162-1172; Luna, op. cit., p. 51.

[125]Ibid.

[126]Baxter and Carroll, op. cit., p. 20.

[127]The Statesman's Yearbook 1968-1969, edited by S. H. Steinberg (New York, 1968), p. 1318; see also International Commission of Jurists, op. cit., p. 12.

[128]International Commission of Jurists, op. cit., p. 12.

[129]Sheldon B. Liss, The Canal (Indiana, 1967), pp. 26-27.

[130]Assistant Legal Advisor Snow to John R. Kelly, June 19, 1950, Whiteman, Digest, III, p. 1171.

[131]By an Act of August 24, 1912, for example, Congress declared that for purposes of extradition the Canal Zone should be treated as an "organized territory" of the United States. For purposes of the Immigration Act of 1917, the Department of Labor ruled that ports in the Canal Zone should be deemed as "foreign ports." Hackworth, Digest, II, pp. 168-172. In the case of Luckenbach Steamship Co. v. United States in 1930, the United States Supreme Court held that irrespective of the extent of the grant of sovereignty over the Canal Zone to the United States by Panama, ports within the Canal Zone were "foreign ports" within the meaning of certain tariff and postal department acts. For purposes of the Narcotic Import Act, however, the Canal Zone was considered as under the jurisdiction of the United States. International Law Reports, Vol. 31, edited by E. Lauterpacht, (London, 1966), p. 125. In the case of the Civil Aeronautics Act of 1938, the Canal Zone was considered a "possession," and for purposes of the Atomic Energy Act of 1946, a "territory." Whiteman, Digest, III, pp. 1171-1175.

[132]Vali, op. cit., p. 261; In 1936 the Supreme Court of Panama, in a divorce action instituted by a woman resident in the Canal Zone, took the position that jurisdiction of the Panamanian Courts might be extended to cases arising within the Canal Zone and involving residents thereof. Hackworth,

Digest, II, p. 172. In 1922, the Supreme Court of Panama reversed the judgment of a lower court, in which two soldiers were found guilty of robbery within Canal Zone territory, for want of jurisdiction. In a later case in 1923, that Court refused to carry out a judgment because Panama had no authority over the Canal Zone or its inhabitants. Annual Digest of Public International Law Cases, 1919-1922, edited by J. F. Williams and H. Lauterpacht (London, 1932), pp. 94-95. In the case of Lowe v. Lee in 1934, the Panama Supreme Court held that though the Canal Zone cannot be considered a foreign country with respect to the Republic, acts of marriage performed in the Canal Zone involving two Panamanians were deemed to have taken place abroad. Annual Digest of Public International Law Cases, 1933-1934, pp. 113-114. In the case of Stafford Allen & Sons, Ltd. v. Pacific Steam Navigation Company in 1956, the British Court of Appeal held that the port of Cristobal in the Canal Zone was a port of the United States. Whiteman, Digest, III, p. 1173.

[133]Norman Kron, "Applicability of Federal Statutes to Non-Contiguous Areas," in Whiteman, Digest, III, p. 1175.

[134]See Oppenheim, International Law, Vol. I, pp. 221-224; Fenwick, op. cit., 4th ed., p. 433; Starke, op. cit., p. 51.

[135]Helen Dwight Reid, International Servitudes in Law and Practice (Chicago, 1932), pp. 109-111. Port Arthur and Talien were leased to Russia, and by an agreement in 1945 between China and Soviet Russia, the two parties agreed for a period of thirty years to a joint use of the port. Wei-hai-wei was leased to Great Britain for a period of twenty-five years and Kowloon for ninety-nine years. Kuang-chou-wan was leased to France. Kiao-chau was seized by Japan in 1920, and at the Washington Conference in 1921-1922, Great Britain, France, and Japan agreed to restore these back to China. Kowloon remains today part of the British Colony of Hong Kong. See Fenwick, op. cit., 4th ed., p. 434; see also the Statesman's Yearbook 1968-1969, pp. 886, 160-163. The occupation in these cases was mainly military, and while the exercise of sovereignty was granted, certain rights of administration, such as police control and criminal jurisdiction, remained under the jurisdiction of China. Vali, op. cit., p. 277; on the other hand, the leases of small pieces of territory granted in 1941 by Great Britain to the United States for the use and operation of naval air bases in Bermuda, St. Lucia, Antigua, and other Caribbean islands, for a term of ninety-nine years, did not involve, apart from a rigidly limited concession of certain jurisdictional rights, any surrender either of sovereignty or the exercise of sovereignty. See Oppenheim, International Law, Vol. I, edited by H. Lauterpacht, 7th ed. (London, 1948), pp. 409-414.

[136]See Vali, op. cit., pp. 273-275, and McNair, op. cit., p. 665. Cyprus was annexed by Great Britain in 1914, and remained a British crown Colony until it achieved its independence in 1960, in accordance with a treaty of guarantee with Greece and the United Kingdom. Bosnia-Herzegovina was annexed by Austria-Hungary in 1908 and today constitutes two of the six federated republics of Yugoslavia. See Fenwick, op. cit., 4th ed., pp. 645, 139; see also Statesman's Year-book 1968-1969, pp. 1620-1622, 474-480.

[137]See Baxter and Carroll, op. cit., p. 12.

[138]Brierly, op. cit., p. 191.

[139]See Schwarzenberger, Manual, p. 123; Vali defines a cession as a "transfer of territorial sovereignty." Vali, op. cit., p. 282; Hackworth defines a cession as ". . . involving the transfer of sovereignty by means of an agreement bebween the ceding and the acquiring state. Hackworth, Digest, I, pp. 421-422; see also Lauterpacht's Oppenheim, Vol. I, pp. 495-498.

[140]Obaldia to Hay, August 11, 1904, Historia Documental, pp. 257-258.

[141]Brierly, op. cit., p. 191.

[142]Vali, op. cit., p. 191.

[143]Ibid., pp. 308-309.

[144]Ibid., see Part Three.

[145]Ibid., p. 307.

[146]Ibid., pp. 254-255, 273. (Italics mine.)

[147]Reid, op. cit., p. 25.

[148]Ibid., pp. 120-138, 198.

[149]Lauterpacht's Oppenheim, Vol. I, pp. 487-488; see also Fenwick, op. cit., 4th ed., pp. 458-482.

[150]Starke, op. cit., pp. 195-197; Consentini considers the juridical character of the Canal Zone created by virtue of the Treaty of 1903 as "an international servitude of a mixed character, implying negative obligations en non faciendo and positive obligations en patiendo. Consentini, op. cit., pp. 172-173.

[151]Brierly, op. cit., p. 191. Other writers who have not embraced the concept are Baxter (Waterways, pp. 177-178), Lauterpacht (Private Law Sources and Analogies of International Law, London, 1927), and McNair (op. cit., p. 656).

[152]Pitman B. Potter, "The Doctrine of Servitudes in International Law," American Journal of International Law, Vol. 9 (1915), p. 641.

[153]P. C. A. (1910), No. VII, in Green, op. cit., pp. 247-248.

[154]P.C.I.J. (1923) Series A, No. 1, Hudson, World Court Reports, I, pp. 173, 175.

[155]See Joseph A. Obieta, The International Status of the Suez Canal (The Hague, 1960), p. 24; see also Baxter, Waterways, pp. 10-11.

[156]Baxter, Waterways, p. 3. See the opinion of the International Court of Justice regarding freedom of passage through international straits, in the Corfu Channel Case (Merits), I.C.J. Reports 1949, p. 4, in Green, op. cit., pp. 185-187.

[157]P.C.I.J. (1923) Series A, No. 1, Hudson, World Court Reports, I, p. 173. (Italics mine.)

[158]See Obieta, op. cit., p. 25.

[159]P.C.I.J. (1923) Series A, No. 1, Hudson, World Court Reports, I, p. 177.

[160]Schwarzenberger, International Law, I, 3rd ed. (London, 1957), p. 223.

[161]Baxter, Waterways, p. 10.

[162]Baxter estimates that the Suez Canal accounts for about one-sixth of the world's seaborne commerce, the Panama Canal for about one-twentieth. The Kiel Canal accounts for more average number of transits than the Suez and Panama Canals put together, but these consist of smaller vessels and less "international" transits. The average number of daily transits in 1963 were: Kiel, 244; Suez, 54; Panama, 35. Ibid., pp. 12-13.

[163]C. John Colombos, The International Law of the Sea, 5th ed. (London, 1962), pp. 183-203.

[164]Historia Documental, pp. 107-108. (Translation and Italics mine.) See also American Journal of International Law, Supp., Vol. 3 (1909), pp. 123-127.

[165]Colombos, op. cit., p. 192; Whiteman, Digest, III, p. 1122.

[166]Whiteman, Digest, III, p. 1087; Hackworth, Digest, II, p. 825.

[167]Colombos, op. cit., p. 185.

[168]Ibid., p. 189; see n. 186 below.

[169]Whiteman, Digest, III, pp. 1088-1130; see also Gross, "Passage through Suez Canal of Israel-bound cargo and Israeli Ships," American Journal of International Law, Vol. 51 (1957), p. 530; see also Colombos, op. cit., p. 189.

[170]Whiteman, Digest, III, p. 1259.

[171]P.C.I.J. (1923), Series A, No. 1, Hudson, World Court Reports, I, p. 178.

[172]Ibid., p. 177.

[173]Whiteman, Digest, III, p. 1256.

[174]Article XVIII, Treaties and Acts of Congress, p. 22.

[175]Article III, Hay-Pauncefote Treaty, Treaties and Acts of Congress, p. 16. See also American Journal of International Law, Supp., Vol. 3 (1909), pp. 127-130.

[176]Ibid.

[177]Treaties and Acts of Congress, p. 24.

[178]Hackworth, Digest, II, p. 781.

[179]Ibid., p. 787.

[180]Historia Documental, p. 473. (Translation mine.)

[181]Hackworth, Digest, II, p. 813.

[182]Whiteman, Digest, III, pp. 1237-1247. (Italics mine.)

[183]Colombos, op. cit., p. 198, and Baxter, Waterways, p. 217.

[184]Baxter, Waterways, p. 220.

[185]Whiteman, Digest, III, p. 1256.

[186]See the joint dissenting opinions of Judges Anzilotti and Huber in the Wimbledon Case, P.C.I.J. (1923) Series A, No. 1, Hudson, World Court Reports, I, pp. 182-186.

[187]Historia Documental, pp. 107, 111. (Translation mine.)

[188]Whiteman, Digest, III, p. 1257.

[189]See n. 175 above.

[190]Article XXIII, Treaties and Acts of Congress, p. 24.

[191]Historia Documental, p. 113.

[192]Baxter, Waterways, p. 175.

[193]See Obieta, op. cit., p. 45; Colombos, op. cit., p. 186.

[194]Hackworth, Digest, III, p. 771 (Italics mine); Erik Castren, The Present Law of War and Neutrality (Helsinki, 1954), p. 139.

[195]Baxter, Waterways, p. 172.

[196]See n. 169 above.

[197]See n. 178 and n. 181 above.

[198]The measures complained of include search, placing of security guards, denial of shore leave, and other allegedly descriminatory practices. Baxter, Waterways, p. 172. See n. 182 above.

[199]See n. 173 above.

[200]Hackworth, Digest, II, p. 771.

[201]Obieta, op. cit., p. 46.

[202]Ibid.

[203]See n. 171 above.

[204]The Geneva Sea Convention of 1958 provides that there must be no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state. The riparian state can, however, take all precautions required for its security; Colombos, op. cit., p. 181. In the Corfu Channel

Case (Merits) in 1949, the International Court of Justice held that ". . . in accordance with international custom . . . States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that that passage is innocent." I.C.J. Reports 1949, p. 4, in Green, op. cit., p. 186.

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